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Interim Hearing on Senate Constitutional Amendment 10 (Presley)

Senate Committee on Judiciary

CALIFORNIA LEGISLATURE

SENATE COMMITTEE ON JUDICIARY

Interim Hearing
on

SENATE CONSTITUTIONAL AMENDMENT 10 (PRESLEY)

November 22, 1983
9:30 a.m. - 4:00 p.m.
Auditorium
Los Angeles Health Services Department
313 North Figueroa Street
Los Angeles, California

CHAIRMAN: HONORABLE BARRY D. KEENE

MEMBERS:

Senator Ed Davis, Vice Chairman
Senator John Doolittle
Senator Bill Lockyer
Senator Milton Marks
Senator Nicholas Petris
Senator Robert Presley
Senator H. L. Richardson
Senator David Roberti
Senator Art Torres
Senator Diane Watson

STAFF:

Richard Thomson, Chief Counsel
Gene Wong, Counsel
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84-6-149

LIST OF WITNESSES

CHAIRMAN KEENE: Good morning ladies and gentlemen. This is a Senate Judiciary Committee hearing -- the meeting of the Senate Judiciary Committee on SCA 10 and related matters.

The requirement of unanimity in criminal jury verdicts is a long-standing common law tradition and is nearly universally a part of the American system of justice. All but five states require unanimity in misdemeanor trials. All but two states require unanimity in felony trials. At the federal level, all verdicts must be unanimous in all criminal cases.

Since 1879 the California Constitution has provided criminal defendants with a right to trial by jury, and that has been interpreted consistently to require unanimous jury verdicts in all criminal cases. SCA 10 proposes to amend our Constitution to allow a non-unanimous five-sixth verdict in any non-capital criminal case.

The United States Supreme Court has found no federal constitutional bar to having states use non-unanimous juries in criminal cases. Obviously it does not follow that because it is allowed that we should adopt the proposal. Rather the proponents of the measure have the obligation of demonstrating why we should abandon the unanimous jury which has always been a basic part of our judicial system and which has been considered one of the bulwarks of American freedom. They have a heavy burden of proof; a tradition as basic as the unanimous jury should not be cast aside lightly.

In particular we need to know the effects that SCA 10 would have on the jury system. Would it result in speedier

trials, with fewer hung juries and more convictions and acquitals? Would it affect jury behavior and curtail full deliberations? What impact would it have on minority group representation on juries? And would it lead to greater numbers of filings by prosecutors? These are some of the questions this committee, and ultimately the voters of California, will have to ask and have answered. It may well be that hung juries are a fact of life, rather than a consequence that is avoidable, and there may not be a solution to the problem short of abolishing the jury.

The purpose of this interim hearing then is to see whether the proponents' burdens can be met. Before beginning, let me note that the hearing is on SCA 10 and not on the "Criminal Courts Procedures" initiative, which is also supported by some proponents of SCA 10. Therefore, I would encourage all the witnesses to speak to SCA 10 and if necessary to allude to the initiative but to keep it within limits of reasonable restraint.

The first witness, and we are very pleased to have you, is Robert Philibosian, the District Attorney of Los Angeles County.

MR. PHILIBOSIAN: Senator Keene, Senator Presley and members of the staff, thank you very much for inviting me to participate in your hearing this morning. I am the sponsor of SCA 10 with Senator Bob Presley as the author.

SCA 10 does not have as its goal more convictions, first of all. Its goal is to speed up the justice process by eliminating retrials in cases where juries have hung by a 11 to

1, or 10 to 2. We have found that in almost every single case where there has been a verdict of 11 to 1 or 10 to 2 the holdout juror or jurors have expressed opinions to other members of the jury which have little or nothing to do with the facts or the law as stated by the judge. We find particularly in sexual assault cases that -- and we had one case in this county that went to trial four times, having hung 11 to 1 three of those times -- in sexual assault cases we have found that jurors sometimes harbor some of these old myths about rape, and do not divulge that information on voir dire, no matter how lengthy or how expert the voir dire is.

Holding those prejudices, those old myths about rape and reactions, or what should be the reactions of a woman in that type of a situation, we have found on many occasions that we have had to retry sexual assault cases, in effect retraumatize the rape victims, who has once been traumatized by the crime; again traumatized at the preliminary hearing; again traumatized at the trial. She must be traumatized at a retrial because one or two jurors harbor these old myths -- these old prejudicies about rape. That's just an example.

Judge Ideman, who is going to testify after me, has a statement from Judge Ronald George with another particularly poignant illustration of what happens when one juror stymies the efforts of the remainder of the jury for reasons that really have nothing whatsoever to do with the facts or with the evidence. In Los Angeles County over the past two years approximately 15% of the felony trials have gone to hung juries. We estimate -- although we do not have the exact

figures -- we estimate that in approximately one-half of those cases -- so we can say about 7-1/2% overall -- juries have been hung 10 to 2 or 11 to 1 for guilty. Although the numbers are small, comparatively, to the overall numbers of cases tried, when we think of the trauma to those victims who must be retraumatized; when we think of the inconvenience to the witnesses who must be recalled; when we think of the expense to the county which must go through another trial; when we think of the court time taken for that case, which is then not available for other cases or for civil cases, we are talking about a substantial expenditure of time, money and human emotions. It is to save that time, that money, and those human emotions that we have proposed this legislation.

You spoke, Senator Keene, of the long tradition of the unanimous jury verdict. I think it is helpful to outline very briefly the origin of the unanimous jury verdict. The origin of the unanimous jury verdict was in medieval England when the only people who could serve on a jury were people who had actual knowledge of the crime itself. We have gone totally away from that particular part of the tradition, so that now people who serve on the jury may <u>not</u> expressly have any knowledge of the crime itself. So, we can see that one-half of that tradition is gone and we are left with the other half of the tradition. The half we are left with no longer makes any sense. No decisions are made in this country, or anywhere in the free world, by unanimous decision. Our California Supreme Court decides matters of life and death by 4 to 3. The U. S. Superme Court decides matters of life and

death by 5 to 4. The existence of that tradition at this point in time no longer has any use in actual procedural -- in any necessity for procedure.

Additionally, you ask that we limit our comments on the Criminal Court Reform Initiative, and I'm going to limit my comments, except to say that this is a part of Criminal Court Reform Initiative and to tell you that a poll was conducted in Los Angeles County about six weeks ago. It was conducted by DMI, which is a nationwide, nationally known polling organization. They conducted a countywide scientific poll, conducted just the same as a poll for, say, a presidential candidacy would be conducted, and they found, asking the question of a ballot proposition, setting forth a jury verdict of 10 to 2 or 11 to 1 -- asking the public whether they would be in favor or opposed to that particular ballot provision -- 72% of the respondents said that they would be in favor of a jury verdict of 10 to 2 or 11 to 1 -- 72% in favor. I have not heard of any ballot proposition or any candidate who has had such a landslide, either in a vote or in a poll. So, I think that lays to rest the concerns of anyone that the public -- the voters, the taxpayers -- will not be accepting of such a provision in the California Constitution. This poll, conducted in Los Angeles County, crossed all sections geographically. The results were no different in one geographic area than in another. The results were no different based on ethnic or racial lines. The results were no different based on the gender of the respondent. The composite and the individual parts remain very closely the

same; the composite was 72% in favor. So, I think that is very significant to a Legislature that is a representative Legislature, and seeks to respond to the will of the people. Thank you very much.

CHAIRMAN: Thank you. If you would stay with us and respond to questions I would appreciate it.

MR. PHILIBOSIAN: I would be happy to do so.

CHAIRMAN: Are there any questions by a member of the committee -- two members of the committee. Senator Davis first.

SENATOR DAVIS: Mr. Philibosian, I can support the concept if I have a feeling that there will be no diminution of justice to an individual and if it makes the process more efficient. In other words, I think that we now win 90 some percent of cases that the District Attorney files, probably in general, and a very high percentage of the jury trials. If this preserves the ability of an innocent person to go free, and doesn't materially disturb the percentage of convictions, but doesn't require us going into additional trials, because of hung juries, this is probably a good idea. Is there any data on states that have employed this, and what impact it had on the percentage of convictions?

MR. PHILIBOSIAN: There doesn't seem to be any impact on the percentage of convictions, and there is no public outcry in the states of Louisiana and Oregon against this particular procedure. The United States Supreme Court says that jury verdicts of 9 to 3 are acceptable under the United States Constitution. I'm willing to accept the finding of the United

States Supreme Court that there is no diminution of defendants' rights, because they have specifically found that.

SENATOR DAVIS: In those two states it has not materially increased the conviction percentage that prosecutors get?

MR. PHILIBOSIAN: No. Not that I am aware of.

SENATOR DAVIS: Now, has it materially.....

MR. PHILIBOSIAN: We are not seeking to increase rate of convictions, Senator.

SENATOR DAVIS: OK. That's what I want to make clear. I'm for more expedient justice as long as it's still justice. Has there been evidence that it has reduced the amount of time that courts and prosecutors, and everyone else involved in the process, are engaged in it?

MR. PHILIBOSIAN: I'm not aware of any specific studies in those states that reflect that. I simply earlier, I think, before you arrived, quoted the statistic that 15% of the jury trials -- criminal jury trials in Los Angeles County -- result in hung juries. Our estimate, although we do not have the actual figures, our estimate is about half of that 15% -- or about 7-1/2% overall -- are hung 11 to 1 or 10 to 2 for guilty, and it is those cases which we seek to avoid retrying, avoid retraumatizing those victims, and having the witnesses come forward again, and to save the expense of time involved.

CHAIRMAN KEENE: Senator Presley.

SENATOR PRESLEY: Mr. Chairman, you indicate the proponents of this bill, and I certainly am one, as the author, and I am very strongly in support of this concept and change

in the Constitution; and you indicated that the burden of proof was on us very strongly to prove that. I didn't know about the 72%. I'm very glad to hear that number one, the exhibit of proof -- the burden of proof is on us. The people out there that this affects strongly support it, and if it does get through the Legislature and on the ballot, there is a strong assumption that it will pass.

The other point I want to make is that, in terms of burden of proof, I know that analysis was written somewhere along the line when SCA 10 was introduced last February, that says support unknown, and I don't quite know why we weren't able to identify the support for this bill, because they certainly haven't been in the closet. Mr. Philibosian, would you enumerate for us, for the record, the groups that, to your knowledge, are in support of the bill.

MR. PHILIBOSIAN: Well, to my knowledge the California District Attorneys Association; the State Chamber of Commerce; the Los Angeles Chamber of Commerce; State Sheriff's Association; California Peace Officers Association. I'm not sure whether the State Chiefs have gone on record. Have they? Yes, they have -- California Police Chiefs Association. All of those groups are in favor; numerous individuals including myself, Judge Ronald George, speaking for himself, but he is the former President of the California Judges Association; and the current Supervising Judge of Criminal Departments in Los Angeles County Superior Court; Judge Jim Ideman, who is here, who is the Assistant Supervising Judge for Criminal Departments, and speaking for himself, but certainly an individual worthy of note. The Sheriff of Los Angeles County, Sherman

Block, who will be here later this morning to testify before this committee. So, there are a number of proponent groups and proponent individuals.

SENATOR PRESLEY: Mr. Chairman, also by what date -- this is a Constitutional Amendment, so we are not stuck with a date, are we, in January?

CHAIRMAN KEENE: I think the only date depends on which ballot one would contemplate putting it on. There is some period in advance of that by which the Secretary of State has to have knowledge that it has passed the Legislature. We can check that for you, unless staff knows.

MR. THOMSON: There is no legislative deadline because it's a Constitutional Amendment.

SENATOR PRESLEY: All right, we will just have to determine which election we are headed for, primary or general, and try to have it heard in sufficient time before the committee.

MR. PHILIBOSIAN: Let me just, if I may, wrap up a bit with one statement. Parenthetically I will supply to this committee an excerpt from the poll, which shows the percentages. I'll bring that in later this morning. But, just to kind of wrap up in terms of placing this on the ballot, I think regardless of the individual thoughts or philosophies of the members of the committee, I think that certainly the people of the state should have the opportunity to vote on this particular Constitutional Amendment. We have seen in one county -- Los Angeles County, which is a fairly represenatative county of the state -- an overwhelming number of

voters who are in favor of this particular legislation, this particular amendment, I think that the voters should have the opportunity to make this choice, to express their will. If they vote in favor of it, it becomes part of our Constitution; if they vote against it then the proponents are wrong in

thinking that this is what the public wants and we will fold our tents and will go away. But, I would urge that this committee pass this bill out so that it may be out before the voters so we may hear the will of the people.

CHAIRMAN: I have a couple of questions I would like to put to you. The first is how much weight we ought to give to the poll. Do you believe that the public that was polled was adequately informed about the issue and the implications of reducing the unanimous verdict to something less than that?

MR. PHILIBOSIAN: Well, as there is in any poll, Senator, one asks the question; one doesn't go through a lengthy discussion of the merits or demerits; proponents or opponents; the pluses and minuses; one simply asks the question and receives a response from the electorate. If it were close -- if it were 51 to 49%, then perhaps we could say that an educational campaign would perhaps sway the opponents or the proponents among the public. But, when we have such an overwhelming response, I doubt whether any educational campaign would change that kind of a response -- would turn it around completely. I think people are generally aware; we have a very well informed electorate in Los Angeles County. These issues have been before the public.....

CHAIRMAN: They are not here today, however. I'm here to be informed by testimony such as yours. The other members of the committee are here; there are a few people out here in the audience, but the great bulk of the people are not really paying a great deal of attention to the issue. My own suspicion is that they are concerned about crime, legitimately,

and anything that they believe would tend to reduce the amount of crime in our society they would go for without necessarily being aware of all the implications. So, our judgment may or may not be the same as that of the public at large for which we get criticized constantly. But, I'm a Legislator who tends to believe that they buy into our judgment as well as representation of what the polls show. Now I don't know if an educational process will change that, and I certainly -- it may make the statistics even more overwhelming in favor of adoption of this kind of thing. But, I think it is a necessary part of the process, and I'm not sure the early polls ought to be relied upon to that extent. We may differ in that respect. I just want you to know what my views are. This is an important issue and we need to reflect honestly on the issue.

MR. PHILIBOSIAN: Well, this poll was taken approximately six weeks ago. This issue has been in the newspapers, on television, on radio; it has been debated; the County Bar has taken a position; there have been editorials one way or another in the electronic media, as well as the print media; various public officials have been speaking about it. It's not an issue that has never before been discussed in public. I think it's also interesting to note, based on your comment that the people would be in favor of anything that they thought would reduce crime. In the same poll the public was asked whether or not they would be in favor of judicial voir dire -- which is another amendment that I have proposed, and is also part of the initiative which was heard by this com-

mittee -- and whether or not they would be in favor of the full restoration of the Grand Jury process, again which is Senator Davis' SCA 6 and is part of the initiative. Although the people were in favor of both of those separate propositions, the amount in favor was not as great as the amount in favor on this particular proposition. So, the public differentiated in this area, and although they may have perceived that all three of those procedures would do something about the crime problem, as you say, they differentiated between those two which were relatively close in percentage, and this which was much higher in percentage. I will supply all of those figures to this committee later this morning.

CHAIRMAN: Also the questions that were put to the public.

MR. PHILIBOSIAN: Yes. I will supply the question and the percentage of responses in each of those areas. I think it is also interesting to note that there is one question that was asked of the public, whether or not their response would be changed if the State Bar Association indicated opposition, and an overwhelming majority said if the Bar was opposed they would be in favor.

CHAIRMAN: No comment. What percentage.....

MR. PHILIBOSIAN: Something like 66%.

CHAIRMAN: No. No. This is a different question. You indicated that approximately -- or I think you had data to show that about 15% of the felonies resulted in hung juries?

MR. PHILIBOSIAN: Yes. That is a statistic from the Executive Officer of the Courts.

CHAIRMAN: In California?

MR. PHILIBOSIAN: No, in Los Angeles County.

CHAIRMAN: Oh, in Los Angeles County.

MR. PHILIBOSIAN: That's Los Angeles County. I don't have a statewide figure for you.

CHAIRMAN: 15% of the felonies in Los Angeles County result in hung juries. What percentage of the misdemeanors? Do you have any idea?

MR. PHILIBOSIAN: They don't have statistics on misdemeanors.

CHAIRMAN: They don't? What percentage of the cases are hung 11 to 1?

MR. PHILIBOSIAN: We don't -- those figures are not kept. Our best estimate, based on discussions with our prosecutors, who have had hung juries, is approximately half of the hung juries are hung 11 to 1 or 10 to 2 for guilty.

CHAIRMAN: What is the empirical basis for that -- the estimated half?

MR. PHILIBOSIAN: There is none.

CHAIRMAN: So, the prosecutors say well, about half of them hang up.

MR. PHILIBOSIAN: Half of the ones who hang up hang 11 to 1 or 10 to 2 for guilty. It is those cases that we are going after, where 10 or 11 people are convinced beyond a reasonable doubt of the defendant's guilt, and one or two hold out, usually for reasons that have nothing to do with law or nothing to do with evidence.

CHAIRMAN: If this is an issue that has been before the

public for some period of time, wouldn't it be useful to have statistics and to know whether that estimate is anywhere near to correct, and not just an impression, so that we could know what percentage of the cases hang up at 11 to 1 and 10 to 2?

MR. PHILIBOSIAN: Those statistics have not been kept. It's almost impossible to go back and try to reconstruct them at this point in time.

CHAIRMAN: But couldn't we start keeping them? Shouldn't we have started.....

MR. PHILIBOSIAN: Yes, and we are.

CHAIRMAN: Can't we start for a year before you.....

MR. PHILIBOSIAN: No. No. We haven't.

CHAIRMAN: You don't need the data that badly?

MR. PHILIBOSIAN: Well, it hasn't been done.

CHAIRMAN: Let me ask you another question. I have been trying to reflect on this issue without a great deal of advance prejudice simply based on the institution and the fact that we've used unanimous in California since the 1879 Constitution, at least. It strikes me that you can have an obstinate person, a corrupt individual; you can have an individual who is so narrow-minded on a jury that that individual will never be persuaded by the others, no matter how persuasive their arguments -- you gave the rape case and the myths held about a rape. I understand all that. I suppose that happens a certain percentage of the time and because we don't really have empirical data, but just impressions, I don't know what percentage of the time that is. But, if it's

1 in 100 times -- 100 jurors -- you get one of those, the prospect of getting two of those on the same jury is going to be 1 in 10,000 -- 100 times 100. Now, if we go after 1 in 100 situation, why do we also have to go after the 1 in 10,000 situation? Why do we have to allow a 10-2? Why couldn't we just move to an 11-1 and to take care of that situation where you have a juror who simply won't be convinced no matter what the evidence shows?

MR. PHILIBOSIAN: 10-2 is already a compromise position, Senator. The United States Supreme Court says 9 to 3 is sufficient.

CHAIRMAN: I'm not talking law or politics, I'm talking public policy now. Why do we have to take care of that all too rare situation, where you have two jurors on the same jury, who are thought to be obstinate, corrupt, or unable to be persuaded by reason?

MR. PHILIBOSIAN: Because generally our finding is that it's not more than two, but it is two more often -- it's two more often than three, let's put it that way. It's one more often than two, and we are seeking to alleviate the problem in one fell swoop in effect. If we run into situations where two people are hanging up the jury, then we want to take care of that also. And those are the situations which would be far more common than three. We feel we are on very safe constitutional grounds because of the United States Supreme Court decision. So, it's already a compromise position.

CHAIRMAN: It is a compromise, I guess, but I wonder if it's a compromise in the best interest of justice. I agree

with you that you can get that individual who screws up the process a certain percentage of the time, and that percentage may be -- I don't know how high it is. But, the prospect of getting two seems to me is infinitely less, and the prospect of getting three is far, far less than that -- so small that you wouldn't need to worry about it -- and yet we are moving to a 10 to 2. I don't think that's the right thing to do at this point. If we are going to change the institution, if we're going to change the structure, it seems to me that we ought to change it in the direction of 11-1. And if empirically we can show that there are enough problems to justify that, I'm willing to support it. I horrified some of the local community when I first took over this chairmanship and said we ought to consider that. I think we ought to consider that. The 10 to 2 does trouble me. I just want you to know again what my views are on the thing.

MR. PHILIBOSIAN: Of course 9 to 3 is based on the civil jury which makes a decision 9 to 3, and with only a preponderance of the evidence -- far less than beyond a reasonable doubt. That's the basis of 9 to 3.

CHAIRMAN: We do a lot of things by simple majority in the State of California and in the country. Imposing taxes is not one of them in California that we do by a simple majority anymore. The analogies though to the California Supreme Court, which functions on a simple majority basis -- 4 to 3, or the U. S. Supreme Court 5 to 4 -- I don't think are necessarily good analogies, because at least under the constitutional theory they are supposed to be resolving

legal issues -- disputes about the law, not disputes about facts, and the laggeries that decide these disputes about facts are in different situations, because factual questions perhaps ought to require a higher majority. And you do allow for a higher majority in a 10 to 2. But, I'm not sure that that's the right break off point, and I'm not sure the analogy holds. We have a group in society that simply questions the fact or makes public policy, or something like that. We do believe in majority rule, because the factual determination that they make is indelible; it's final and it's rare that an appellate court will overturn something on the lack of evidence to come to that conclusion. So, I think we need to be careful in this area that we don't draw on wrong analogies.

I'm sorry, I didn't mean to get into that much speech-making this morning, but I wanted to share my views with you at this stage, and I'm willing to be persuaded, and I'm willing to move in the direction that you would like to move in. I'm not sure I would like to move as fast and as far as you would like to go, even though you indicate you are not moving as far and as fast as you could move. Thank you very much.

MR. PHILIBOSIAN: Thank you very much, Senator.

CHAIRMAN: Senator Davis.

SENATOR DAVIS: I would just like to say at this point, I'm very happy that you are the District Attorney of Los Angeles County.

CHAIRMAN: Judge James Ideman. Nice to have you with

us, although I must admit as a former classmate of Judge Ron George, I would have been happy to see him this morning as well.

JUDGE IDEMAN: Well, he regrets very much that he cannot be here, Mr. Chairman. Good morning, Senator Davis, Senator Presley.

CHAIRMAN KEENE: He is becoming a morning television personality, I understand.

JUDGE IDEMAN: Yes, he has. I watched him on TV. He wasn't on very long, if you happened to.....

CHAIRMAN KEENE: I heard about it. I missed it. I wish I had been able to catch it.

JUDGE IDEMAN: I have a statement from Judge George which I would like to read to the committee, with your permission. I am also here on my own behalf and I will have something to say after I read Judge George's statement.

"I regret having been called out of town and being unable to attend this hearing, but I wish to endorse wholeheartedly the provisions of SCA 10, which would permit conviction in non-capital criminal cases by a 10 to 2 or 11 to 1 vote, apart from the unanimous vote presently required. This is a statement of my personal position, and is not intended to represent the position of the court. In my experience the one or two holdout jurors for aquittal and a hung jury typically are individuals who refuse to deliberate with their fellow jurors and who have preconceived biases precluding the giving of any consideration to a conviction in the case before them.

"A typical example reported in the attached clippings from the October 5, 1983 editions of the Los Angeles Times and the Los Angeles Herald Examiner involved a federal prosecution in Los Angeles arising out of a large-scale international child pornography operation. A solitary, unreasonable holdout juror sabotaged the case. The juror who deadlocked the jury with the only not guilty vote, is described in the articles as having appeared not to listen to most of the testimony, and having admitted not hearing any of the tape recordings. The holdout juror announced almost immediately after the case was submitted to the jury that he would never vote for a conviction. He referred to defense witnesses, who did not testify, and stated that all law enforcement officers are liars, indicating, 'I didn't want to be on this jury to start with,' and 'let another jury convict her.' According to other jurors the holdout juror 'sat in a chair, his back to the other 11 reading a book.'"

CHAIRMAN: Isn't that an argument against changing voir dire?

JUDGE IDEMAN: I have a remark too about that myself. I'm also here in my own capacity, again not purporting to represent the views of members of my court. So, my background may be of some interest to the committee.

Prior to my election to the Bench I was for 15 years a deputy district attorney in Los Angeles County; I was never an administrator; I was always a trial lawyer. I've been five years on the Bench assigned to the Criminal Division, so I've been trying criminal cases for 20 years in Los Angeles

County. I'm also a Colonel in the United States Army Reserve, in the Judge Advocate General Corps. In that capacity I serve as a Military Judge, and I go on active duty two weeks a year, usually to Ford Ord where I try cases by court-martial. With regard to the latter, the Army and the other Uniformed Services, for years have had a lack of unanimity requirement for verdicts -- two-thirds in cases where the possible punishment is under ten years, and three-quarters for cases where punishment is over ten years -- unanimous for capital cases only. Although the Uniformed Services in recent years have added substantial protections to the rights of the accused, this is one thing that is never tampered with. It works fine in the military. I realize a court-martial is not the same as a civilian criminal trial, but there are important similarities, and in the end it's the question of whether or not the guilt of an individual is proved beyond a reasonable doubt.

With respect to my service as a trial lawyer and as a judge, I have tried hundreds of jury trials myself, both as a lawyer and as a judge. And being in the business one tends to discuss other cases with one's colleagues, both other trial lawyers and now other judges, and so one's experience is beyond the particular cases that we've tried ourselves. But it's only really expanded by the trials that other people have participated in. And I cannot remember in all of the 20 years that I've been in the Criminal Justice System wherever it was felt by the lawyer or the judge involved in the case that an 11 to 1 holdout juror did so for any

rational basis. In every case that I can remember, it was a case like the one cited by Judge George -- someone put his back to the others, folded his arms, and said, "Let me know when you are ready to acquit, I'm not going to have anything to do with the case."

By chance, and only by chance, I was the Trial Judge in the case referred to by Mr. Philibosian where the defendant was tried four times and ultimately freed. I would like to take a moment to tell you about that case. This was a case in which a young woman was with her fiance in Hollywood celebrating, I believe, their engagement. They had been to an Italian restaurant; they left the restaurant about 11:00 o'clock, and they went to get the car, which was parked in a parking lot. They were accosted by four men who beat up the boyfriend, and left him bleeding and robbed on the ground of the parking lot -- took his wallet and his property. They opened the trunk of their Cadillac; they threw the young lady into the trunk of the Cadillac and drove off with her to a distance of several miles to an alley somewhere in Los Angeles, where she was repeatedly gang raped and sodomized, and forced to submit to oral copulation. The main offender, the individual that Mr. Philibosian referred to, then took her to a motel where he continued to rape her throughout the night, ignoring the pounding of his confederates who were banging on the door to the motel room -- they were angry because they were being denied their turn by this defendant. Three of the four were apprehended. Two of the three pled guilty before me in a negotiated disposition for 12 years in prison,

which is what they got. The main offender went to trial four times. The first time he was tried was before me and the jury was 11 to 1 for conviction. The evidence on the defense side was that the lady had, upon seeing the four men and seeing them beat up the boyfriend -- the boyfriend had made some remark to them, so that's why he was beaten -- the robbery was denied -- and upon seeing her fiance lying bleeding on the parking lot, she told the men that she had always desired to have sex with strangers, and crawled willingly into the trunk of the car, and then went down to wherever they took her and willingly participated with all of these people. It was a very implausible defense. The argument made to the jury was along racial lines, that there was talk about and illusions to lynchings in the South where a white woman would accuse a black man of rape, and so forth, and it reached its mark, and one juror, for reasons described by the other jurors as being completely irrational, refused to participate in the case, voted for not guilty, 11 to 1.

The second time he went to trial was before another judge -- Judge Jerry Fields of our Court. I wasn't available at that time -- on the same evidence and that jury -- same argument -- and that jury hung up 11 to 1 for the same reason.

The case then came back to me for a third trial, and by this time the victim was weakening. The attorney then would read portions of her preliminary hearing testimony and read testimony from the first two trials, and obviously there was

some discrepancy every time a person testifies, and the jury also gets to know that there had been two trials before. So, this case hung up 9 to 3. I thought the case was so aggravated and such a miscarriage of justice was occurring that I decided to order an unprecedented fourth trial. Nobody that I have talked to in our business has known of a case that has been tried four times. Usually two is about it, and three for a case that is especially heinous or serious. Well, I thought this case should be tried a fourth time.

It went to another judge -- I again was not available -- and this time the victim was really wearing down. This was her fifth time to present this testimony. And that jury hung up also. I think that jury was something like 7 to 5, and the case was dismissed and the main culprit is a free man today. Had we had SCA 10 he would be making license plates well into the next century.

CHAIRMAN KEENE: What if we had provision for an 11 to 1 verdict?

JUDGE IDEMAN: That would have taken care of the situation. So, I can say that, based on my experience in the civilian legal side, the military legal side, that I think SCA 10 is an idea whose time has really come.

One other point. There is a great expenditure and waste of public funds now in very lengthy voir dire proceedings -- very, very lengthy questioning of jurors and far too many peremptory challenges are permitted.

CHAIRMAN: Wouldn't that fellow in the first trial have been weeded out if the voir dire had been properly imple-

mented, they would have found out that he did not want to serve on the jury.

JUDGE IDEMAN: Well, no. There was very extensive voir dire in all the trials, and this voir dire failed to disclose this type of feeling by this person. Obviously the prosecutor who was a very talented Deputy District Attorney -- one of the best in the office. She now heads up, I believe, the sexual assault program for the DA's office -- top attorney and she was unable to see this.....

CHAIRMAN: The connection I can't make is that he willingly admitted after the jury hung up -- he said, "I never wanted to serve on this jury in the first place." Is that something.....

JUDGE IDEMAN: No, that was Judge George's case that I read you. That was a child pornography jury.

CHAIRMAN: Oh. OK.

JUDGE IDEMAN: The jurors in this case apparently were put off by racial feeling.

CHAIRMAN: Which were not able to be disclosed --

JUDGE IDEMAN: They were not able to be disclosed. There was question about those feelings, but it didn't turn up, and the juror was permitted to serve in each case.

CHAIRMAN: Yet, you know that was the basis for the judgment of the holdouts.

JUDGE IDEMAN: Oh, yes, because the other jurors were quite incensed by it and spoke to the attorneys afterwards.

Now, the last point I would like to make is this. A lot of time is now wasted in extensive voir dire and many

peremptory challenges. One of the justifications for very, very careful voir dire, and for the use of many peremptory challenges is attempting to weed out the type of person that would arbitrarily hang up a jury, and I know there are other moves afoot to cut down on voir dire, and cut down on peremptories, and this seems to me to dovetail nicely because if you don't have to worry that much about the one odd or the two odd people that will irrationally hang up a jury, then the reason for extensive voir dire, and the reason for a large number of peremptory challenges also is ameliorated. So, I think that the savings would be far beyond the conviction of people who would have gotten off on 11 to 1 or 10 to 2 verdicts before. Thank you. I'll be happy to respond to any questions.

CHAIRMAN: Thank you. Any questions by members of the committee of Judge Ideman? Thank you very much. That was very interesting and informative. Please say "hello" to Judge George for me.

JUDGE IDEMAN: I shall.

CHAIRMAN: Professor Alan Scheflin.

PROFESSOR SCHEFLIN: Mr. Chairman, members of the committee, I appreciate the opportunity to be called here to testify in reference to this proposed amendment to the California Constitution. I have written extensively on juries and have been quoted in court opinions and by judges and speeches; I've often been a consultant on jury issues. Perhaps my expertise here is based on my having authored chapters on non-unanimous jury verdicts and jury selection procedures,

a book that I understand has been basic to the thinking of your staff counsel.

What I propose to do is to talk about the history and the considerations involved in non-unanimous jury verdicts. Let me start by saying that juries in criminal cases have decided unanimous jury verdicts for over 600 years with very few moments in time as exceptions. Therefore, the gravity of the proposal that we consider today seems to me is fairly obvious. I appreciate the opportunity to be heard for that reason.

When we turn to history we find a number of arguments, none unfortunately compelling as to the unanimity requirement. Unfortunately the history of the unanimity rule is shrouded in mystery, and of the many different theories virtually none of them apply to the legal procedures that we have today. We know this at least, that the right to a jury is a sacred right, starts in 1215 with the Magna Carta, and that by 1367 all experiments with non-unanimous juries were repealed and the unanimity requirement became the law of the land, as well as the law of our land. Legal historians Pollack and Maitland wrote, "From the moment of our historical records in the very beginning we seem to see a strong desire for unanimity." That certainly is true. In the original draft of the 6th Amendment the House of Representatives put in language that would make unanimity a "requisite." That language was stricken by the Senate, because the Senate believed that a jury had to be unanimous, was in fact what the definition of a jury was. So, the absence of language in the 6th Amendment

requiring unanimity stems from the Senate's belief that unanimity and jury are synonymous terms.

I've said that the historical arguments for the most part are not conclusive, and I, therefore, will not go through them. All of them relate to procedures that are not part of our legal system today. What is relevant, however, is the Supreme Court's determination of the constitutionality of the unanimity rule, a determination based not only on historical analysis, according to Justice White, but rather on a functional analysis of what the jury is. And I would like to focus on the functional analysis, which Justice White, I think, in surprisingly stark language, language which has been repeated in several Supreme Court cases, said the right of a jury trial is granted to criminal defendants in order to prevent oppression by government. He said further, the framers of the Constitution strove to create an independent judiciary, but insisted upon further protection against arbitrary action. Providing the accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. I will add more to that when we talk about the political considerations of juries. But, it's clear that the Supreme Court believes that the issue of unanimity as a constitutional matter is geared toward the function of the jury, and that the function of the jury is to interpose a community body between the defendant and the prosecutorial powers of the state. In that regard, when we turn to the cases themselves

they seem surprisingly to ignore that constitutional test.

Let me, for your benefit, run through very quickly the history of Supreme Court decisions in this matter. There are only a few. In 1968 the U. S. Supreme Court decided Duncan vs. Louisiana, holding that the 14th Amendment guarantees to state criminal defendants a right to trial by jury. In 1970 that right was extended by a plurality of Baldwin vs. New York to all non-petty criminal offenses. A non-petty offense is defined at least as one that carries a six-month or more potential sentence. In 1970 in Williams vs. Florida the Supreme Court decided that a six-member jury in state criminal cases is in fact constitutional. Based on language that it would be the functional equivalent for the purpose of interposing the community between the state and the prosecutor, the court could see no reason why a six-member jury would function any differently than a 12-member jury. In point of fact, as the near unanimous literature on small group decision-making suggests, the court was in error in that conclusion. Nevertheless the issue before us is not the size of the jury, but rather the unanimity rule. In 1972 the U. S. Supreme Court decided Johnson vs. Louisiana and Apodaca vs. Oregon, upholding state criminal jury trial verdicts of 9 to 3 and 10 to 2. Once again the court said that a functional analysis of the jury permits a less than unanimous verdict, thereby authorizing the states to in fact provide for majority verdicts in criminal cases. There is no question in my mind, therefore, that the proposed Amendment is in fact a valid exercise of constitutional authority by the state.

The question is whether or not it is a wise exercise of that power, not whether it is a legitimate exercise of that power.

Let me just as a footnote point out that we know from two further Supreme Court decisions that a jury of a non-unanimous jury of less than 6, or a unanimous jury of less than 6 is constitutionally impermissible. In that regard, as I think you have already noted in one of your position papers, the bill as written is potentially unconstitutional, and will need to have some of the language changed. According to the California Constitution there is the possibility in misdemeanor cases for agreement on a less than 12-member jury. That would seem in light of the proposed amendment here to be impossible. I'm not sure how you would get five-sixths decisions out of less than a 12-member jury, unless it's a 6-member jury. If it's a 6-member jury then it's clearly in violation of Ballew vs. Georgia, a U. S. Supreme Court decision, and Birch vs. Louisiana, a U. S. Supreme Court decision. And so, as it is presently written, there is a constitutional infirmity in the bill. I assume that to be a minor matter, but nevertheless it does exist.

The question of the wisdom, as opposed to the power, to decide non-unanimous verdicts it seems to me is why we are here, and in that regard I follow the wise words of Alexis de Toqueville that "the jury is both a judicial and a political institution." As a judicial institution, in fact, the jury plays a statistically small and perhaps even statistically insignificant role in the criminal justice

system. Of all criminal cases in California, as is true nationwide, 9 out of 10 cases are plea bargained or settled without jury disposition. In the 1 out of 10 cases that is settled, that is not plea bargained, a percentage of those cases will be decided by non-jury decision-making -- defendants will choose not to have a jury trial. We're talking approximately of 8% of all of the criminal cases in California. Of that 8% the overwhelming number, approximately 90% will be decided by unanimous verdict. So, in fact we are talking about one-tenth of one-tenth of the criminal cases in California. I will take questions by the way. Therefore, the actual application of this bill will be 1 out of every 100 cases in California at best, and probably even a fewer number than that. And so the judicial significance of this bill, and therefore, the question of its cost and time effectiveness, it seems to me need to be put in perspective. This bill will not save very much time, nor will it save very much money. It will save time and it will save money, that's clear, but the amount of time and money I think will be statistically insignificant, and in any event it must be measured against the price which must be paid for the jury as a political institution.

CHAIRMAN: Senator Presley.

SENATOR PRESLEY: You're talking about cost. How do you measure the injustice that was just described by Judge Ideman?

PROFESSOR SCHEFLIN: Yes. I agree with you, Senator. It seems to me that what I heard did appear to reflect a

terrible injustice. But, let's put what we heard in proper perspective. We were told by the good Judge that in this particular instance a criminal defendant was tried four times. We were also told that most hung juries result because of biased, or corrupt, or unthinking, unfeeling jurors. Now what we were told, in other words, is that in four separate juries they would have turned up at least four, but in terms of his statistics, five, six or seven biased, corrupt jurors. That strains my credulity. I'm sorry. I don't believe it. In fact, it seems to me that hung juries are not essentially the product of biased jurors, or corrupt jurors. There is no question that instances of that do occur, and this may very well be one of them, although we have to say it happened four times seriatim. If we were to take this particular case as a standard then we would have hung juries so much more frequently than we do now. I just find it hard to believe that four separate juries would hang up in the same case four separate times because four biased individuals would be found in a fact pattern that seems so glaringly oriented towards a conviction. There must be some other explanation. I suggest to you the explanation is that prosecutorial inartfulness or incompetence is one of the major sources of hung juries, where the jury in fact wants to convict, but the prosecutor has failed to meet the burden of proof beyond a reasonable doubt, and a conscientious juror will respond to that by saying, "I may in my heart of hearts believe this defendant is guilty, but I've taken a solemn oath to not convict except on proof beyond a reasonable doubt, and the prosecutor has failed to deliver that proof."

SENATOR PRESLEY: Well, I guess the only response to that would be, as testified here, to get more competent deputy district attorneys in the District Attorney's office.

PROFESSOR SCHEFLIN: And that may very well be. There may have been an insufficiency of evidence. I can't address -- it baffles and saddens me, I think in the same way that it does you. But, I can't say that the explanation is that half a dozen corrupt individuals wound up sitting on four different juries in the same case. The statistical likelihood of that happening is very, very remote. I would rather say there is some other explanation, which we may not be aware of.

SENATOR PRESLEY: The only other thought I would have -- as long as I have you interrupted -- would be a comment. It seems to me we certainly have to have the ability to adapt to change, and this is a vastly different world than it was 600 years ago. We are now certainly in a modern age, the electronic age, the nuclear age, as we saw a couple of nights ago. To hang on to the fact that historically this was the way it has been for 600 years, I would rather look at it that we are in a different time, circumstances are different and we should have constitutional provisions adapt.

PROFESSOR SCHEFLIN: I agree with you wholeheartedly, Senator. That's why I thought the arguments -- the historical arguments were inconclusive and in fact irrelevant. I don't think it would be appropriate to draw from the longevity of the unanimity, the functional necessity of una-

nimity, and that the fact that we've had something for 600 years does not necessarily speak well of it.

SENATOR PRESLEY: I guess I misunderstood you. I thought you were hanging on the historical aspects.....

PROFESSOR SCHEFLIN: On the contrary, I agree with you.....

SENATOR PRESLEY: There is no question about the constitutionality of it. That has already been decided.

PROFESSOR SCHEFLIN: Yes, I think that the historical reasons are best left to history, for the unanimity rule.

SENATOR PRESLEY: If you are not opposed historically, and you are not opposed constitutionally, let me be specific: Why are you opposed?

PROFESSOR SCHEFLIN: I'm opposed politically. To address the question I think that was asked of a former speaker by Senator Davis, whether or not the increase in efficiency would also signal a decrease in justice, I believe that it would. I believe that we would get a worse quality of justice and find more severe horror stories, if in fact we pass this amendment. I have no question that the historical reasons and the constitutional reasons are sufficient to say that there is the power.

SENATOR PRESLEY: So, you are not concerned about the fact that we could have deterioration of justice?

PROFESSOR SCHEFLIN: No. I'm concerned about the fact that we <u>will</u> have a deterioration of justice. It seems to me that that is both inevitable and commonsensical. Let me explain why. I think my response on this matter will be unusual.

SENATOR PRESLEY: It's all in the eyes of the beholder. You are talking about justice as it pertains to the defendant, and not to the victim.

PROFESSOR SCHEFLIN: No. I'm also thinking about the victim in that sense. If you in fact want to do justice to the victim in a pure sense you would abolish the jury system entirely. That, by the way, has already been proposed in one of the local law journals. An article by Professor Kessler in Volume V of the Loyola of Los Angeles Law Review about a decade ago, suggests the total abolition of the jury and that as a stopgap measure, we reduce jury size and also reduce the unanimity rule by requiring majority verdicts. But, we do that only on the way to a total abolition of the jury. It seems to me that my notion of justice is not just to the victim, but to the victim as a member of the larger society which tries to do justice, and that at some particular point an individual victim may wind up not receiving justice, but the procedures to deliver justice will have been maintained. In short, what I'm saying is that I think the unanimity rule serves a very important purpose for justice considerations, in that it protects all of us from majority rule. Let me express myself on that point, because I think that what I have to say will be surprising to you. I favor the unanimity rule precisely because of what you might consider its anti-democratic functioning. The jury system is in fact the only point in our entire system of government where a minority.....

CHAIRMAN: I'm sorry. You favor the unanimity rule?

PROFESSOR SHCEFLIN: Yes, precisely because of what you

might consider its anti-democratic characteristics. In the legislative forum the majority rules; a minority has no ability to protect itself through the exerise of the franchise. In the executive system that's true as well. In the judicial system that is similarly true, because judges are for the most part either elected by popular vote, majority will, or selected by individuals who have been already voted by majority will. It is only in the jury that a minority can speak for itself, and therefore, it is only in the jury that an individual has the ability to function, as Justice White suggested, as an interposition between the defendant and the powers of the state. It is the anti-democratic nature of the jury in that sense -- I put anti-democratic in quotes -- that protects all of us. Let me address that anti-democratic characteristic more closely.

In our constitutional democracy we do not equate majority rule with what is just or what is right. Instead we want everyone to have a voice in our government, although the majority, as we know and expect, will make most decisions. But, a jury serves to protect a minority from being trampled on by a majority, and it also serves to protect the majority from trampling on its own rights. Let me quote to you from Chief Justice Story's commentaries on the Constitution. It's short, but I think quite elegant. "The great object of a trial by jury in criminal cases is to guard against the spirit of oppression and tyrannyon the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed it is often more important to guard

against the latter than the former." I happen to believe that. Let me refer to the remarks of the first speaker who said that on the basis of a local poll 72% of the people would support this amendment. I don't doubt that. What we have is the majority deciding that the majority will rule in the only part of our government where it doesn't rule. I'm surprised the figure is as low as 72% in that regard.

SENATOR ROBERTI: Passing the state budget is the other part.

PROFESSOR SCHEFLIN: Exactly.

SENATOR PRESLEY: Of course, this is far more than a majority, it's even more than two-thirds, what we are proposing here.

PROFESSOR SCHEFLIN: The 10-2 or 11-1. Yes, but it's reasonable to assume that the 10-2 or 11-1 verdict will stifle the minority members who are on the panel. Let me give you an illustration. Far more evidence than I need to cite here suggests that prosecutors as a matter of routine use the power of peremptory challenge to strike minorities from juries in many major criminal cases. If the prosecutor can be permitted to reduce the potential number of minorities who sit on juries, and then the 10-2 or 11-1 can be used to stifle the voices of the few who actually do sit on juries, we have eliminated the ability of minorities to protect themselves in hearings of a judicial nature, and so, we in fact do a double disservice to minorities. I don't think it's the numbers that are significant. If we dealt only with 10-2 or 11-1, I would rather deal with the fact that it's

only one in 100 cases that at the most would be affected by this rule, and it seems to me that that is not too high a price to pay for the fact that unanimity suggests to us a legitimacy to the jury system as well as the legal system that in times of unrest by minorities we can't afford to ignore. Remember that in 1968 the Jury Selection and Service Act extended the possibility of serving on juries to the widest possible number of individuals in the United States history. It is precisely after we extended the franchise to serve on juries to as many people as possible that we decided we would remove their voice on those jury decisions. I don't think politically that's wise or fair. I'm satisfied the majority rule will be the rule in legislative, executive and judicial decisions. I don't see the impetus to do so in jury decisions, even despite the fact that a jury will occasionally reach the wrong result -- a result that -- maybe that's what happened in the four succeeding trials that we heard about earlier. That is a price to pay. There is no such thing as a perfect system of justice. People will also wind up being acquitted under this bill, who would ordinarily perhaps have had another disposition. I think that because it applies to such few cases statistically, and because the jury is the essence of our symbol of constitutional democracy, I would rather err on the side of the kinds of cases I heard this morning, and feel sad about that, than eliminate from the jury system a represenatative sampling of the cross section of the community. Yes.

CHAIRMAN: I have to cut you off at some point. We have a number of other witnesses. I don't know -- has your question been responded to -- not perhaps in the manner you would like, but.....

SENATOR PRESLEY: Well, it's been responded to, but not convincingly. I guess I'm just not convinced. It just seems to me that we have a justice system that I suppose is supposed to serve everyone, and to make it effective, then, they throw all kinds of roadblocks in front of it -- to prevent the police, to begin with, in terms of how they search and how they arrest. Then, we've got all kinds of roadblocks to the district attorney as to what evidence he can present or what he can't present; and then you get the jury and you throw some more roadblocks in. And so it just seems to me that we have the justice system that's serving the defendant very well, but not serving the victim so well. That's just a matter of opinion, I guess, there's no answer one way or the other.

CHAIRMAN: Senator Roberti is next and then Senator Davis.

SENATOR ROBERTI: I want to speak about minorities protecting themselves. I take it that you mean that a jury being a cross section of the community has to have a representation of people who have similar like experiences, hopefully, and therefore people on the jury who would be minority with any kind of nature. You have a better chance of having a shared life experience with the kinds of situations the defendant may find himself in that the majority may not have.

Is that what you mean, or do you mean some kind of rough numbers with minorities and non-minorities being convicted?

PROFESSOR SCHEFLIN: Well, I think by minority I mean anybody who happens to be in a minority in that particular case. It could be racial; it could be sex based; it could be religious; it could be political; it could be social. I think what I'm saying is that we know from a vast amount of research on small group deliberations, that a jury that does not have to reach unanimity will not listen to all of its members; that in fact that once an initial vote is taken and that vote is in fact 10 to 2 or 11 to 1, the likelihood of continuing deliberations, or deliberations with an open mind decreases dramatically. And so, what I'm saying is that the majority will not listen to the minority however the minority is constituted in that particular case; that the amendment will have the effect of exercising majority rule, which in most cases perhaps might be permissible, but in the cases that are the most important -- the high visibility cases; the cases where the defendant really does have an argument of being the wrong defendant, or of being a victim of political persecution, we will eliminate the opportunity for a minority juror to stand on that ground. We know that most jurors will favor the prosecution; they will believe correctly I think, that where there's smoke there's fire, and that as a general rule prosecutorial staffs don't bring people to trial unless they are in fact guilty. We, of course, convict 97% or so, or 96% of the people against whom criminal charges are brought, and so I think the DA system in

that regard is working fine. I don't see the imperative to take the 4% of cases in which defendants feel they have a legitimate grievance against the complaint filed against them -- the indictment filed against them -- to take away their right to be heard, since their position in being a defendant will be a minority position to start with. Under this proposal it seems to me we would have certainly sent John Peter Zanger to the gallows, and definitely William Pitt as well. And I would think that for the sake of our constitutional liberty we are better off having jurors reach an occasional wrong decision by being hung than we are by making sure that we obtain more convictions, but not necessarily just convictions.

Let me address very briefly one further point. What you will do as a result of this amendment, of course, is decrease the quality of prosecutorial performance, because it will no longer be necessary for the prosecutor to develop a case to the point of unanimity, and since the overwhelming number of people who serve as jurors will undoubtedly have a pro-prosecution bias anyway. In fact the prosecutors will not have to convince that minority and will not try to do so. You will also encourage the exercise of peremptory challenges to in fact get a first vote 10 to 2 or 11 to 1 verdict, and there probably will be very little in the way of deliberations in the jury room. It seems to me that that does not contribute to a sense of justice I feel comfortable with.

CHAIRMAN: Senator Davis.

SENATOR DAVIS: I want you to answer this question, yes or no, if you can. Have you specifically studied Louisiana and Oregon before and after the change to a non-unanimous verdict?

PROFESSOR SCHEFLIN: No, I haven't.

SENATOR DAVIS: I have no further questions.

PROFESSOR SCHEFLIN: I wonder if I could address myself to the reason why? Just very briefly.

CHAIRMAN: Can you do so with a couple of sentences?

SENATOR DAVIS: Another question, yes or no. Have any other scholars specifically studied the before and after percentage of convictions? Yes or no?

PROFESSOR SCHEFLIN: I am not aware of any.

CHAIRMAN: Don't leave yet. Dividing your presentation into two halves -- your ability to reduce 600 years of law and history to ten minutes I think was no less than astounding.

PROFESSOR SCHEFLIN: Thank you.

CHAIRMAN: I think it was a brilliant performance and I tried to absorb as much as I could because I recognized that it was coming in a very condensed manner to us. I thought it was very useful though, and I give a lot of weight to your conclusions. I have some questions about them, but I am pleased that you are concerned with the history of the thing, with what the law says and, hopefully, with empirical data as well as just polls, and your arguments against giving too much weight to the poll I think is a useful one in this particular context. Let me play the devil's advocate for a minute, and I'm not sure it's not my position, so I shouldn't call it the devil's advocacy, but why shouldn't society be

able to protect itself against the statistical oddball, a guy that will not reason; a guy that is in fact the bigot who sits on the jury and will not give, in whatever direction the elements of reason and opportunity to make themselves heard in his or her own mind, and stifles the process with respect to at least that case, and whatever number of cases in which that statistical oddball appears. Now I've distinguished earlier between the 11 to 1 and the 10 to 2 in that respect; that the 10 to 2 has to be far more remote in terms of producing the two statistical oddballs on the same jury. But why should not society in a 11 to 1 situation be able to protect itself against that statistical oddball that I refer to?

PROFESSOR SCHEFLIN: I think that it's not the question of why it shouldn't protect itself; I think every rational reasonable society would try to protect itself. The question is what price does it have to pay to do that. If I might, for example, use a hypothetical in a related field, we can take dangerous people off the streets, if we could predict who would be dangerous. Now, under the best of tests -- one that would be 95% effective, we would wind up taking hundreds and hundreds of people off the streets erroneously. It seems to me that the price here would be, we can solve that one case, but at the expense of untold numbers of cases in which we would be doing injustice. It seems reasonable to believe.....

CHAIRMAN: Well, hidden in all that -- and I think Senator Presley may be right in this respect -- that hidden in all of that is the assumption that you look at the defendant

and talk about the relationship of the minority juror -- not just racial minority or ethnic minority, but minority in all.....

PROFESSOR SCHEFLIN: That's correct.

CHAIRMAN: .....different senses to the defendant and should not that minority juror be able to assert himself against the others? What about the relationship as depicted in the earlier cases that were described by Judge Ideman where that individual prevents a minority victim from receiving justice in the sense that the defendant is protected by that bigoted act on the part of the minority juror -- and I mean bigoted also in a broad sense. It may not be racial; it may be sexual; it may be professional; it may be anything.

PROFESSOR SCHEFLIN: Yes. Well, one of the cases that is always proposed in this area is let's take us to the Freedom Rider situation down South, and suppose we have a virtually all white jury deciding against white defendants, whether or not there are crimes having been committed by them. If one or two minority members were able to sit on that jury and escape the peremptory challenge, of course, those defendants would be acquitted rather than experience a hung jury. It seems to me that the argument for fairness in justice cuts both ways. There is no way we can guarantee that these cases will be decided the way we want. I don't see the value of obtaining convictions perhaps as strongly as some of you may. I think 95% to 97% of convictions is a high enough figure, and that the one or two or three or four

cases that we may have to retry to get a conviction, or may not be able to obtain a conviction, is a relatively small price to pay. But, if you take away a minority.....

CHAIRMAN: But, isn't the deterrent effect of convictions, doesn't that have to do with public perception, and if you asked the public today how many -- if you asked the criminal element today how many people get convicted in criminal cases, and how many get off, and they'll say, "Well, with a good lawyer I can get off," and large numbers of defendants are going free or criminals are going free with a slap on the wrist, and that whole conception that you can get out of it somehow.

PROFESSOR SCHEFLIN: That's right. Well, certainly I agree with you that there are various loopholes in the procedural presentation of cases and in the unconscionable delay in the requirement of a speedy trial, accounts for a great deal of error. But, I don't think you can say that hung juries fit into that category. They are in numbers of cases statistically insignificant, and in those numbers it's not accurate to say that juries were hung by biased or corrupt individuals. While that's true in some of the cases, it's certainly not true in all of them; and perhaps not even true in most of them. Part of the difficulty in studying this, is that if in fact we did determine that the conviction rate would go up, as it inevitably must -- in jurisdictions like Louisiana and Oregon -- that wouldn't tell us that they are delivering a better system of justice; that would just tell us that more people are being convicted. It may be that more people are

being convicted unfairly. We don't know that. Further, the problem of studying actual juries I'm sure is familiar to you. Most of our research comes from small group deliberations and from mock juries. There are parameters as to how closely actual real life juries can be studied. And so our data is by necessity drawn from a related field and not the actual experience of jury service. If in fact the conviction rate, as I said, goes up, it seems to me that is not necessarily indicative of a better brand of justice.

CHAIRMAN: Let me ask if there is anything further by the members. Thank you very much. You have certainly added a great deal to the hearing. Steve White? Professor Gerald Uelman. Is that correct?

PROFESSOR UELMAN: Yes. My name is Gerald Uelman and I am a Professor of Law at Loyola Law School, and I am delighted to be here. I'm speaking on behalf of California Attorneys for Criminal Justice, an organization of approximately 1700 criminal defense lawyers. What I would like to do is present a brief historical overview that touches some of the areas of the history of the jury that Professor Scheflin did not talk about, and then present to you what I believe are 12 good reasons why we should preserve the unanimous jury in California.

Going back to the misty fields of Runnymede in 1215 -- at that time the jury was not actually a fact finder. The jury was actually a group of neighbors and witnesses and the trial was simply a contest between the victim and the defendant to see who could come up with 12 congregators who would

swear to his or her innocence. After the jury's role was transformed into that of a fact-finder, in approximately the 14th century, unanimity was valued so highly that a jury was required to continue deliberating -- i. e. it could not be discharged until they reached a unanimous verdict. And to speed that process along the jury was kept "without food, drink, fire or candle until their verdict was reached." So, there literally was no such thing as a hung jury at early common law, only a hungry jury.

These coercive tactics were abandoned in the 18th century and we started feeding juries and quenching their thirst, and only at that time did the problem of the jury deadlock actually arise. One of my favorite early California cases involved a defendant who sought a new trial on the ground that the jury deliberating his fate on a charge of murder had consumed 20 gallons of beer, 2 demijohns of wine, 2 bottles of whiskey, as well as other wine and whiskey at each meal, including breakfast. The court did grant a new trial in that case.

But quenching the thirst of juries created the deadlock, and the deadlock presented a real consitutional dilemma to the courts a century ago, because the requirement of unanimity conflicted directly with the protection against double jeopardy that a person could not be tried twice for the same crime, and the courts opted in favor of preserving the requirement of unanimity and interpreting the double jeopardy provision to allow a retrial if the jury was unable to reach a unanimous verdict. I think that raises a legitimate question, whether a valid historical argument could be made that

abandoning the requirement of unanimity requires the reinstatement of the original protection against double jeopardy, to preclude the retrial altogether of a defendant if a jury is unable to reach a verdict.

England abandoned the requirement of unanimity in 1967 and they do allow 10-2 verdicts in England. But, the criminal.....

CHAIRMAN: Excuse me for interrupting, but you are raising that as a policy question or as a legal question?

PROFESSOR UELMAN: Just to give you a historical perspective. In terms of what England did?

CHAIRMAN: No. In terms of whether there is a resurrection of the prohibition against double jeopardy.....

PROFESSOR UELMAN: Double jeopardy protection.

CHAIRMAN: .....by the abandonment of the unanimity rule.....

PROFESSOR UELMAN: I'm raising that as a possible constitutional problem that this legislation could raise. I think there are several others which I will touch on.

Under the English Criminal Justice Act of 1967, however, the jury is required to deliberate for a minimal period of time before they can return a non-unanimous verdict. The minimum is two hours and the judge can set a longer period in a complex case that he believes requires more deliberations. The commitment to unanimity, however, remains very strong in the United States. Only two states have abandoned it in felony cases. The first state to do so was Louisiana. Louisiana amended its State Constitution in 1898 to permit 9-3 verdicts in all but capital felonies. Inter-

estingly in 1898 the Louisiana Supreme Court held that any retroactive application of this change would violate the ex post facto clause of the Federal Constitution, and that is a problem you may want to address with respect to this legislation, whether it could have any retroactive application. I believe it could not without serious constitutional problems under the ex post facto clause.

CHAIRMAN: Senator Presley.

SENATOR PRESLEY: You say in Louisiana they did that in 1898?

PROFESSOR UELMAN: 1898.

SENATOR PRESLEY: Since then they've had 9 to 3 juries?

PROFESSOR UELMAN: No. While they amended the Constitution in 1974 to now require 10 rather than 9, but they have had this proposal in effect.....

SENATOR PRESLEY: Let me follow up on Senator Davis' question. Do you know anybody that's studied that? It's been in effect all those years, we ought to know whether or not they're turning out a lot of injustice.

PROFESSOR UELMAN: There have been studies of what effect this has on the jury deliberation process, especially in Oregon, and I will touch on that in my testimony.

SENATOR PRESLEY: As far as you know, there have been no studies done?

PROFESSOR UELMAN: I'm not aware of any specific Louisiana study that addresses it.

SENATOR PRESLEY: Someone must have done a Ph.D. dissertation on that.

CHAIRMAN: You couldn't very well do a before and after study, since it happened so long ago.

SENATOR PRESLEY: Well, you could do a comparison study.

CHAIRMAN: Comparison with another state perhaps.

PROFESSOR UELMAN: The change in Oregon was much more recent. Oregon adopted the 10-2 jury verdict in 1934, and apparently that change was inspired by a recommendation made by the American Law Institute in 1931. But, significantly, both of these states took this position long before the U. S. Supreme Court had even held that the constitutional right to jury trial under the Federal Constitution applied to the states, and when the Supreme Court took that step in 1972, as Professor Scheflin indicated in the Johnson and Apodacca decisions, it opened the door to other states to take the same step, and I think it's significant that in the intervening 11 years no other states have taken that step. Louisiana and Oregon remain at this point the only two states which allow non-unanimous verdicts in felony cases.

Now I would like to briefly run through what I think are 12 good reasons to preserve the requirement of unanimity. Some of them have already been touched on by Professor Scheflin.

Reason number one. The requirement of unanimity furthers the essential requirement of proof beyond a reasonable doubt in criminal cases. I think it's significant that as you go back through 600 years of history of the jury the unanimity requirement has always been linked to the requirement in criminal cases that we prove guilt beyond a reasonable doubt. In fact the leading historian of the English common law, Sir James Fitzjames Stevens, after his historical

study of the criminal law of England, found that link so strong that he concluded, "In my opinion, trial by jury has both merits and defects, but the unanimity of jurors is essential to it. If that is to be given up the institution itself should be abolished." In other words, he regarded unanimity as such an essential part of the jury deliberative process that if we are going to give that up we might as well throw the whole thing out.

CHAIRMAN: Did he ever say why?

PROFESSOR UELMAN: Because of protecting reasonable doubt. His reasoning was we need the protection of reasonable doubt the most in the closest cases, and in the closest cases we are going to have the greatest likelihood that one or two jurors are going to have a reasonable doubt, and if we ignore that and allow a verdict to be returned we are giving up the degree of certainty that we should have before we declare someone guilty or innocent of a crime.

CHAIRMAN: I don't exactly follow that reasoning. How is it a close case if it's 11 to 1?

PROFESSOR UELMAN: Well, you are going to have 11 to 1 verdicts in the closest cases, and in the closest cases is where this concept of reasonable doubt gives the greatest proection.

CHAIRMAN: If you had 5 to 4, or 6 to 3, or 7 to 2, how is 11 to 1 close? I don't understand that.

PROFESSOR UELMAN: It's not close in terms of the division of the jury, but it's in that kind of case where the evidence is close that allowing that one juror's

reasonable doubt to preclude a verdict gives the greatest protection.

CHAIRMAN: OK. My numbers are wrong. I was dealing with 9-member juries in my mind. But, I don't see how that is considered to be a close case if it's 11 to 1. I don't understand that argument.

PROFESSOR UELMAN: Well, what I'm saying is it's in the closest cases that we are going to have the possibility of a hung jury present itself.

CHAIRMAN: Yes.

PROFESSOR UELMAN: And when that possibility presents itself, preserving the value of one juror's doubt of being enough to abort the proceedings gives us a greater protection to that concept of reasonable doubt, and I think that was Stevens' point.

The second reason I would advance is one that hasn't really been talked about, and that is the value of the deliberative process itself. I think perhaps the most dramatic illustration I could offer is a fictional one. It's the presentation in motion pictures and in a Broadway play called "Twelve Angry Men" where the jury retires and their first vote is 11 to 1 for conviction, and their final vote is 12 to 0 for acquital. Now that kind of turnaround doesn't happen very frequently in actual cases. In fact the studies that have been done of jury behavior suggests that in only one out of ten cases does the minority actually turn around and convince the majority. But that process is worth preserving, because if we permit the jury to return a verdict

as soon as they have 10 votes or 11 votes, that minority view may never be listened to. The doubts of a Henry Fonda who is hanging up the jury may never be thrashed out in the jury room.

And that leads me to reason number three, and that is that the experience in the states which allow non-unanimous verdicts confirms that jury deliberation is cut short. Now here I'm referring to a survey of all felony jury verdicts in Multnomah County, Oregon for a three-year period ending in 1983, and that survey revealed that a majority of all verdicts returned by juries in Multnomah County were not unanimous. 30% were 10 to 2; 26% were 11 to 1; and only 44% of their verdicts were unanimous. Now compare that to our experience and the experience in other states requiring unanimity, where only approximately 2-1/2% of the juries hang up by a 10 to 2 or 11 to 1 vote. I think that makes it clear an abolition of the unanimity requirement removes any motivation that the jurors may have to continue deliberations after they achieve the 10 or 11 votes required for conviction or acquital.

My fourth reason is that the requirement of unanimity ensures full participation of minorities in the jury process. Professor Scheflin touched on this. I think it's especially important in California where we value so highly the ethnic and cultural diversity of juries that we constitutionally preclude the use of any group bias to strike a juror during the peremptory challenges to the jury.

My fifth reason is that the unanimous verdict is greater

public assurance that final justice has been done. I think the finality of a jury verdict conveys a symbolic message to the community at large. It says to the community that all reasonable doubts have been resolved, or in the case of a verdict of not guilty, that all of the jurors concluded that the prosecution had not overcome the burden of proving of guilt beyond a reasonable doubt. And that precludes second guessing, and it unites the jury in a public declaration of their decision. They come in, they are polled, they say, "We all agree with this verdict," and that says something to the community. Since in California a juror is permitted to impeach his own verdict, it can be anticipated that abandoning this unanimity requirement will increase such challenges, using the affidavits of dissenting jurors. Such challenges have become commonplace in civil cases in California, and I think under this proposal they will become commonplace in criminal cases.

My sixth reason is that the vast majority of states adhere to the requirement of unanimity. I've already touched on that. It's clear that after 11 years Louisiana and Oregon continue to stand alone. The vast majority of the 50 states plus the federal system still adhere to the requirement of unanimity.

CHAIRMAN: The federal system is required too, constitutionally?

PROFESSOR UELMAN: Yes. It is required -- constitutionally required.

My seventh reason is, I think, kind of the counterpoint to what Judge Ideman had to say this morning. Judge Ideman's

example, I think we should bear in mind, ultimately resulted in the conviction of the culprit. But unanimity is a two-edged sword. Not only does it protect the defendant against conviction until 12 jurors are convinced of his guilt, it also protects the community against acquital unless 12 jurors agree that there is a reasonable doubt as to his guilt, and there is at least one convicted murderer who is now in state prison who would be walking the streets of Los Angeles right now if this proposal were in effect.

On August 24, 1980 four citizens were gunned down near the intersection of Pico and Robertson in Los Angeles. Three of the victims were elderly residents out for an evening stroll, and one was a young French tourist visiting Los Angeles. At the first trial of the two defendants accused of these four murders, the jury hung 11 to 1 for the acquital of Perry Jackson. One juror had no reasonable doubt of his guilt, and that juror's conscience was vindicated in a re-trial at which Jackson was convicted of those four murders. He is now serving a term of 96 years to life in the state prison, and if this proposal had been in effect at the time that trial took place, he would be walking the streets.

CHAIRMAN: Senator Presley.

SENATOR PRESLEY: That is not totally correct, is it? Couldn't the district attorney try him again?

PROFESSOR UELMAN: No. Not if this proposal were in effect. The 11 to 1 verdict for acquital would have freed him. The DA was, of course, free to try him again; did and got a conviction under the present requirement of unanimity

CHAIRMAN: Isn't that one of the baffling but sad situations that Professor Scheflin referred to. I mean, how does one explain an 11 to 1 in favor of acquittal, followed by a 12-0 in favor of guilty?

PROFESSOR UELMAN: Well, the evidence may be more convincing at the second trial.

CHAIRMAN: But the probability of that occurring is ever so slight, I guess.

PROFESSOR UELMAN: All I'm saying is the probabilities cut both ways.

CHAIRMAN: It cuts both ways.

SENATOR PRESLEY: We're talking about the probabilities cutting both ways. That's the first time I ever heard of a case like that. That's the first example I've ever heard. Do you know of any others?

PROFESSOR UELMAN: I'm sure I can come up with some.

SENATOR PRESLEY: That's the first time I've ever heard of it cutting that way.

PROFESSOR UELMAN: I myself as a prosecutor, prosecuted a man for a counterfeiting conspiracy and got a 10-2 for acquittal the first trial and a conviction at the second trial. It does happen.

CHAIRMAN: I guess it's as improbable as the other case where you had four acquittals based on the alleged prejudice against the victim. That sounded very improbably to me. I guess it's hard to tell.

PROFESSOR UELMAN: All right. Reason number 8 that I would offer to preserve unanimity, is that allowing 10-2 verdicts would eliminate only a small portion of jury dead-

locks. You're going to hear later today from Professor Flynn, who conducted a study of all felony jury trials in the ten most populous counties of California for a three-year period, and that study revealed that, while about 12% of all jury trials ended in a deadlock, in the vast majority of these cases the final split between the jurors was by a margin greater than 11 to 1 or 10-2. Over 60% of the hung juries involved a final vote of 6-6, 7-5, 8-4 or 9-3. So, these deadlocks, of course, would continue, even if this proposal were in effect.

Reason number nine. I also draw from Professor Flynn's study because it showed even as to the deadlocked jury trials very few of them necessitated a retrial. Only one-fourth of those cases were actually retried. 40% of the cases were subsequently dismissed; 34% were resolved by guilty pleas; and in the one-fourth that were retried, 18% resulted in conviction, and 8% in acquital. I think that suggests that we are paying a very small price for the requirement of unanimity.

Reasons numbers ten and eleven related specifically to what I see as drafting defects in the language of this proposal, because this proposal simply provides that except in capital cases the jury's verdict must be by five-sixths of the jurors. Now while the provision maintaining the requirement of unanimity for capital cases reflects, I believe, a plausible concern for greater certainty before we take someone's life, unfortunately the corrolary of this provision is that one who faces execution must bear a heavier

burden to gain acquittal, because in a capital case he must get a unanimous acquittal. In order to justify that kind of classification, I think the state is going to have to show a compelling interest, and even if a simple rational basis test were applied, there doesn't appear to be any reason why the defendant should face a heavier burden to gain his acquittal simply because his conviction might end his life.

SENATOR PRESLEY: I'm losing something here. If somebody faced a burden of gaining his acquittal, if he is acquitted, probably 11 people very likely, or 10 voted for his conviction. So his acquittal would be about one, two or three.....

PROFESSOR UELMAN: The problem is, Senator, you are saying to a capital defendant, "You cannot be acquitted unless all 12 jurors agree that there is a reasonable doubt of your guilt." Whereas if he were not a capital defendant, he would be acquitted as soon as 10 jurors had a reasonable doubt. Even if two thought he should be convicted, and you're denying that advantage to a defendant, simply because he is charged with a capital crime.

CHAIRMAN: Isn't there a public policy argument that it is more serious both for the public at large and for the defendant, and therefore you want a unanimous verdict before conviction, or unanimous acquittal before you free the person?

PROFESSOR UELMAN: I don't think that that public policy argument is very weighty. In fact in Oregon they have avoided this problem. If you look at the Oregon constitutional provision, it simply says that unanimity is required for a

conviction. 10 out of 12 is OK for any felony case, except a capital case, and they say for first degree murder conviction you need a unanimous verdict. But, the Oregon Constitution permits an acquittal of first degree murder based on 10 out of 12 jurors. So, they've avoided this problem, and I think it is a significant constitutional problem in terms of equal protection.

The other problem I see, and this is reason number 11, relates to the problem of lesser included offenses. Typically in a murder case the jury will be instructed that if they find an essential element of first degree murder is not present, they can then go on to find the defendant guilty of second degree murder or manslaughter, which are lesser included offenses, if they find all the elements of those offenses. But, under this bill you are saying no verdict can be returned except a unanimous one in a capital case. That presents the possibility that the jury could unanimously agree that there is not a first degree murder; 10 out of 12 of the jurors could agree that there is manslaughter, or second degree murder, and they couldn't return a verdict.

SENATOR PRESLEY: Well, I understand what we're doing, Professor. We are not touching the capital cases at all. We are just leaving them alone.

PROFESSOR UELMAN: Oh, no. No. You are not, because you are saying, in the language of this bill, in a criminal action other than for an offense punishable by death, five-sixths of the jury may render a verdict.

SENATOR PRESLEY: That's what I said, we are setting it aside.

PROFESSOR UELMAN: But, what you are doing is creating an anomaly, because in a non-capital case -- let's say the defendant were charged initially with second degree murder or manslaughter -- clearly all we would need would be a 10-2 verdict, but simply because the case starts out with a prosecutorial charge of a capital offense, you change the whole equation and you say no verdict can be returned unless it's unanimous. I think that creates a significant.....

SENATOR PRESLEY: If that is the problem, is it fixable?

PROFESSOR UELMAN: It's fixable in this bill. Unfortunately it's not fixable in the criminal justice -- the Criminal Court Procedure Initiative, because that's beyond correcting at this point. It's cast in stone.

SENATOR ROBERTI: Run this one by me again.

PROFESSOR UELMAN: OK. What this bill says is, "Other than for an offense punishable by death five-sixth of the jury may render a verdict." All right. We start with a first degree murder charge that is punishable by death. The jury agrees -- it is not first degree murder. 10 out of 12 of them agree, let's say that it's second degree murder. They can't return a verdict because in this criminal action we're dealing with an offense punishable by death. The problem was avoided, incidentally, by the Oregon provision, by simply saying that for a first degree murder verdict you need a unanimous jury.

My final point, and I will close on this note, and reason number 12 I think is that the abolition of the requirement of the unanimity will create a precedent for further

dilution of the right to jury trial. The tradition of unanimity runs unbroken through 134 years of California history, and centuries of English and American practice, and I fear that once that tradition is broken we can anticipate further efforts to dilute the protection of the right to jury trial. Why not 9-3 verdicts; why not reduce the size of the jury? In the colorful words of Justice L. Thaxton Hanson "The camel's nose is in the tent," and he warns us that the red light is flashing against any further tampering with California's jury system. "In my view," he states, "any effort to reform California's criminal justice process by further tampering with the 12-member jury would be extremely unwise and counterproductive." I very seldom find an opportunity to agree with Justice L. Thaxton Hanson, but on this point I concur. Thank you.

CHAIRMAN: Any questions of the witness? Thank you very much for your testimony. John Steiner.

MR. STEINER: Good morning. It's a pleasure to be here and I'm delighted to testify before the subcommittee. Most of the points which I had been intending to make have already been made by the two Professors who testified before me. But, let me run down one or two which I think are particularly important.

The idea of a 10-2 jury verdict would, I think, substantially draw into question the defendant's right to a cross section of the community on the jury panel. What often happens, for example, if there is a black defendant and one black, two blacks on the jury, the peremptory challenges

will be used to remove from the jury those people who are also black, and I think it could go to any minority, and I think it drastically changes the defendant's opportunity to get a fair cross section of the community on his panel.

There is a long history -- everyone has talked about it -- the unanimous jury panel is a basic, essential part of American jurisprudence which I don't think should be ignored. This bill is clearly intended to ease the prosecutor's burden of proof, and it will do that. It could, and undoubtedly will, lead to convictions -- more convictions on less evidence than is the case right now, and I think that's the intent of it. I think that's something that needs to be looked at very carefully, because I think you stand a much greater chance of convicting innocent people when you allow a non-unanimous verdict of this type.

I was going to use the Twelve Angry Men analogy, because I think that's particularly appropriate. Senator Keene, to respond to one of the questions that you posed earlier, do you assume automatically that if there's an 11 to 1 division that the one person is automatically the oddball? It seems to me that there is a substantial possibility that that one person may have in fact seen something others didn't see; or those two people may have seen something that others didn't see. So, unless you define that person as an oddball to begin with, it seems to me then we have to give their views some credence.

CHAIRMAN: Just to clarify my position, it is not that the one person who is the holdout is in every case an odd-

ball, but in a certain percentage of those cases -- I don't know how many -- you're going to have an individual who is totally obstinate or potentially corrupt. And those are the cases that people who are on the other side of the issue purport to be concerned about and the cost of reprosecuting those cases in such situations. It is possible that all of the reason that is available to that jury, the resource of reason, is vested in a single individual in an 11 to 1 situation. But, it is to me unlikely -- very statistically improbable -- that if all the reason is vested in that individual and not in the other jurors, that that individual will have been unable to persuade any of his or her colleagues as to the innocence or guilt of the individual involved, and you know there is always that other case, and there is always that sliver of possibility that a particular case will be the case in which that probability will arise. But, I think it's very slight -- ever so slight.

MR. STEINER: I understand the point that you are making and I don't disagree with you at all. But, it seems to me that one of the basic tenets of the American system of justice has been that better ten guilty people go free than one innocent person be convicted, and I don't think I'm leaning too heavily on the rights of the defendants. This is part of the framework of our legal system; it's part of what this society is made of, and it seems to me that the very fact that there are likely to be, or that there may be some people in a situation who don't agree makes it very important to protect the right in this situation.

The one other point that I would make, and I think it fits right along with this -- it's been mentioned briefly before, but the idea of unanimity, requiring unanimity of the group it seems to me can have only the effect of improving the quality of deliberation. If you go back into the jury room and there are 9 people who are for either conviction or acquittal, then they know all they need to get is one more and they can look hard or lean on particularly one individual. But, the whole quality of the deliberations, the reasoning process, it seems to me would be -- is vastly improved when the jury is aware that they must come out with a unanimous verdict. And I would say also that the concept of jury unanimity does go to support the "beyond a reasonable doubt" standard which is another basic part of our jurisprudence.

I haven't heard the position of the Attorney General this morning, but I think it's very significant that the Attorney General's office in this situation is taking a position opposing this bill. This is a prosecutorial agency run by a man who used to be the District Attorney of Los Angeles County, and I think it's rare on a bill like this that we get the kind of mixed support, or mixed opposition, if you will, in this particular situation.

As a final comment I would just add to the questions that have been asked before regarding the studies, or have studies been done of other jurisdictions which have had this problem. The fact is there are only two in the entire nation that allow 10-2 convictions on felonies, and the fact is

apparently -- at least in California, no real work has been done on it to study what has gone on in other communities. To make such a radical change in our criminal procedure without a very, very detailed sophisticated study of what effects this approach has had in other jurisdictions is a very, very dangerous, I think, and radical change with our jury procedure.

CHAIRMAN: OK. Any questions of Mr. Steiner?

MR. STEINER: Thank you.

CHAIRMAN: Thank you very much for being with us. Frank Bardsley.

MR. BARDSLEY: Good morning. I am here as a representative of the California Public Defenders Association, but in that capacity, as Judge Ideman did, I think it would behoove me to give you my background. Since 1969 I have been a practicing Deputy Public Defender in the Los Angeles office; and in the last two years I have been the Division Chief of our Central Superior Court Trials Division. So, to this particular discussion this morning I bring a certain history and a certain viewpoint on this issue. I don't think it would be surprising that I am absolutely against SCA 10 that we are talking about this morning. I think Professor Uelman and the other Professors that have testified, and will testify today, have covered many of the grounds that anyone could come up with, but I think the bottom line that this committee and the Legislature must deal with is what

kind of society do we want to live in as citizens of the State of California. I think it is beyond question that as we reduce the requirement from 12 to 0, to 11 to 1, or 10 to 2, or 9 to 3, that through those cracks will fall innocent people who will be convicted. I think the very fact that in capital cases that it's required that we maintain unanimity is, if not an agreement, at least a concession that that is the case, because in capital cases obviously it's too serious to take that chance.

Coupled with the fact that the cost that we are dealing with here, the proponents I think suggest that we are going to save money and that's the reason that we should do this, the cost savings and the time savings, I think, balanced against where we are going to be as a society is simply not worth it.

The District Attorney this morning led off with some statistics.....

SENATOR PRESLEY: Where we are as a society at the moment, we have a lot of dissatisfaction. To a certain extent the courts and the criminal justice system has been discredited. I think we need to improve on that. And one reason I think it has been discredited is that the system seems to be so weighted in favor of the defendant and against the victim. That's why people are sick and tired of it after a while. It's been going on so many years and they, as indicated in that poll, think some changes are necessary to fine-tune this system.

MR. BARDSLEY: Senator, I think the passage of this type of legislation would in the long run exacerbate the

very problem that you are trying to alleviate. When people in this state are sent to the state penitentiary for long, long periods of time; when members of the jury that convicted them are convinced that they are innocent, it is not going to make the people as a whole feel that the system has the moral force it should. I think this is exactly the wrong way to get at the problem that you are trying to alleviate.

SENATOR PRESLEY: If you recall, the District Attorney's testimony this morning, he said most of the people who hold out don't do it based on the evidence, maybe they do it on some kind of bias, they're dogmatic, or something totally aside from the evidence.

MR. BARDSLEY: Well, I would like to -- I was going to address the District Attorney's testimony because there was some misstatement, I think, of provable fact there. I will start at the beginning with Mr. Philibosian's testimony. He said that the Executive Officer of the Los Angeles County Superior Courts indicated that 15% of all cases that are tried are hung juries. It was published yesterday, I might add, in the Daily Journal the Executive Office of the Superior Courts study for the last five years indicates 9%, not 15%, are hung juries. The study that Professor Uelman talked about, that Professor Flynn, I'm sure, will talk to you about later today, was a three-year study of the 10 largest counties in the State of California that tried 81% of all the felony jury trials in the state during 1971, '72 and '73 -- almost 9,000 jury trials -- indicated that of the cases that are hung -- now we're talking the 9% that are hung -- of that 9%, 75% are never retried, only 25% are re-

tried. I would submit to you that it's obvious which cases are retired and which ones aren't. 40% of the hung juries are dismissed. Those are the cases I submit that are 11 to 1, 10 to 2 and 9 to 3 for acquittal. In 35% the defendant pleads guilty, and those, I would submit to you, are the cases that are 11 to 1, 10 to 2, 9 to 3 for conviction. The 25% of the 9%, which comes out to 2% of all the jury trials, those are the ones I would submit that are hung 7 to 5, 6 to 6 and 8 to 4. This legislation will not reach those cases. The impact of this legislation is going to be absolutely minimal in the criminal justice system. On average last year the best statistics that we can have in Los Angeles County that this would result in savings of less than three cases per month for the entire County of Los Angeles in retrials. And would also.....

SENATOR PRESLEY: There might be a difference of opinion on these figures. I just don't believe that the District Attorney and the Judge that was in here today would be supporting this bill if that was all they get out of the bill, what you say.

MR. BARDSLEY: They get something else out of it, Senator. I think that's something we ought to be very honest about. Again, the statistics have shown that cases that are hung 11 to 1 or 10 to 2, whether they be for acquittal or for conviction. So, what I think, in answer to Senator Davis' question, "Are we getting more convictions through this legislation?" The answer is "yes," you will get more convictions through this legislation on the first trial. That is apparent. All the studies have shown that. The question

that I think you have to ask yourselves, "Are you saving enough money and enough time with that one case out of less than a thousand that you are going to save on the retrial to do away with something that is as important to the American system of criminal justice as the unanimous verdict?" I personally don't think you are, and I think you are going to see if this particular piece of legislation gets on the ballot, I think you are going to see that 72% that Mr. Philibosian was talking about is nothing like 72% when the electorate really understands what we're talking about here.

CHAIRMAN: Isn't that somewhat conclusionary about "as important to the American system of justice as the unanimous verdict?" Aren't you deciding the question when you compare it in those terms?

MR. BARDSLEY: I think that's the question that perhaps you, as Legislators, have to determine. How important is that issue? To me, and to the organization which I represent, it's extremely important.

CHAIRMAN: OK. And the why for that is that otherwise some innocent people will.....

MR. BARDSLEY: To me personally that is one of the single most important things that I can think of. Our whole system of justice is based on what Mr. Steiner has just said, that innocent people not be convicted. That, in my opinion, is the real reason for the jury and the unanimous jury system. It is to make real sure, to the extent that we can, that we do not convict innocent people. We are going to convict more innocent people with 10 to 2 verdicts or 11 to 1 verdicts than we do with unanimous. I think that follows absolutely.

CHAIRMAN: What about the argument from the other side that says that the prospect of being able to act criminally in our society without sanction ever being imposed causes a certain number of criminals to do what they do and that there will be a certain number of innocent victims that will fall prey to those criminals as a consequence of leaving it unanimous.

MR. BARDSLEY: In the last sentence you got past me. I would agree totally that criminals should be apprehended and they should be convicted and they should be punished. That's as important to me as a defense attorney as it is to anyone else. I am a citizen of this society like everybody else.

CHAIRMAN: The prospect of eluding that, according to proponents of this measure -- the prospects of eluding that induce a certain amount of criminal behavior to which innocent people fall victim. Aren't you as concerned about those innocent victims as you are about the innocent defendant?

MR. BARDSLEY: I don't think the premise is correct. If you are saying that because a case is hung 11 to 1 or 10 to 2 for guilty that the criminal goes free, it is simply not true. That is not the fact. The fact is that if the case is hung 11 to 1 or 10 to 2 for guilty, the overwhelming percentage of the cases the defendant is going to plead guilty at that point. He's seen what happens if he goes to trial. The other percentage of the cases, certainly the district attorney isn't going to dismiss, he is going to retry, and these cases that are retried, the statistics again --

I'm sure Professor Flynn will tell you -- are overwhelmingly for conviction. So, nobody is going free to be again foisting themselves upon the public because it's hung up 11 to 1 for guilty.

CHAIRMAN: But, if that percentage is so small, what is the prospect of an innocent defendant being convicted under an 11 to 1 system?

MR. BARDSLEY: I think we have obviously not that many. But, I can tell you this. I would say almost monthly -- either in the Los Angeles Times, San Francisco Chronicle, Sacramento Bee, you can pick up the newspaper and read of instances where people have been in prison for long periods innocently. It happens all the time, unfortunately. That's a price we have to pay in our system, I believe. However, you can rest assured you will be reading about that a lot more on an 11 to 1, and considerably more again for a 10 to 2, and what I'm saying is you have the power to do it. Is it worth it? I don't think it is for what you get on the other side. You get very, very little.

CHAIRMAN: Senator Presley.

SENATOR PRESLEY: You use the phrase "It happens all the time." What do you mean by that?

MR. BARDSLEY: Senator, by that I mean that.....

SENATOR PRESLEY: I think it happens quite rarely.

MR. BARDSLEY: It happens.....

SENATOR PRESLEY: It doesn't happen all the time.

MR. BARDSLEY: Senator, this much I can say. The State Public Defenders Office puts out a publication that I re-

ceive every two weeks. Part of that publication deals with -- doesn't deal with, but it has aspects to it which deal with innocent people that have been convicted and it has since been found out that they have been released. I get this publication twice a month and I would venture to say that at least half the time there is such an instance shown. Now, these are cases where somebody may have been in custody years upon years upon years. They have now been found. All I'm saying is that that number will increase. Obviously those people that go to jail for 90 days, 120 days, or one or two years the chances of any inequities that have occurred there being found are very small.

SENATOR PRESLEY: If we are convicting that many innocent people and sending them to prison, that it happens all the time, then I am in doubt that would be a very heavy concern (inaudible).

MR. BARDSLEY: It does happen, Senator. I wish -- there is obviously no way that we will ever know how often. All we can know is those few cases after the fact that are found out. The other cases that aren't found out we don't know. We know it has happened, we know that we have executed people in the United States that have been proven to be innocent after the fact.

SENATOR PRESLEY: Given the limitation on all the screening that takes place before a person is finally judged guilty, it just seems like if that happens all the time we sure have a leaky system.

MR. BARDSLEY: Senator, let me.....

SENATOR PRESLEY: First of all, there are inhibitions on the police, there are investigation and arrest procedures, there are inhibitions there. Then before they can even file a complaint, the district attorney has to make a screening. Then before the conviction, there are restrictions on the admissibility of evidence. Then you get to the jury, it has to be unanimous and with all of that weighted in favor of the defendant, and you say it happens all the time. You are saying that innocent people are being convicted regularly.

MR. BARDSLEY: I don't want this committee to place a percentage on what I meant by that. I don't know what that percentage is; I simply don't. I don't think anybody in the United States does.

SENATOR PRESLEY. It's all the time means pretty common.

MR. BARDSLEY: I think it is happening perhaps, unfortunately it probably is happening -- it has to, we're human beings, we're fallible -- it has to happen.

SENATOR PRESLEY: You have to admit that's just an assumption on your part. You can't prove.....

MR. BARDSLEY: I cannot prove what percentage that is. It's all I can take you back.....

SENATOR PRESLEY: .....that statement that you're making.

MR. BARDSLEY: I can take you back in literature. I can take you back in history and point to instances of it. What I'm saying is those instances are going to increase.

SENATOR PRESLEY: What you are saying today is it happens all the time. You augment it by saying that it is an assumption on your part.

MR. BARDSLEY: Senator, I can prove that it has happened. I can prove that.

SENATOR PRESLEY: Not all the time.

MR. BARDSLEY: What does all the time mean? It's a small percentage -- today it is a small percentage of the cases -- a very small percentage of the cases.

SENATOR PRESLEY: What do you mean all the time?

MR. BARDSLEY: It has happened throughout our history. It has happened since I have been.....

SENATOR PRESLEY: How frequently?

CHAIRMAN: Senator Davis.

SENATOR DAVIS: Do you think it happens very often with public defenders doing the defending? I think you guys are pretty good. If I was being charged I would much rather have a public defender than paid counsel, I think, because I think you put your heart into it. You are exceptionally good lawyers, and you conspire together and get defendants off. You analyze the courts and where to go and I find it difficult to believe that it would happen very often to someone who was represented by a public defender. Now, if he just picks up counsel and is short of money or something, it might happen more there, but I think in a California Public Defender system that happens a lot less frequently than it would in most other states.

MR. BARDSLEY: That may be the case, Senator. I would tend to agree with you, and I'm not trying to tell this committee that is something that happens 10% of the cases, or 5% of the cases. I don't suspect that it's that high, I

don't know. All I am saying to this committee is that it does happen, and I think we all know it, and I think we all have to agree that if we go to 11 to 1 or 10 to 2 it is going to happen more often. To what extent we probably will never be able to find out, but it is going to happen more often. That is the point that I'm making. What we are getting in

payback from this legislation is so miniscule that I don't think if it happens one time more it's worth it, but certainly not if it happens to the extent that I think that it may on a 10 to 2 verdict, or even 11 to 1.

And in answer to something Senator Presley said earlier, in these instances where a jury has voted 11 to 1 to acquit and will turn around and vote the next time to convict, Perry Jackson was the most recent example that comes to mind -- those cases happen from time to time too, and I think maybe Senator Davis would be able to second this. I think oftentimes when a prosecutor tries the case the second time, his case is going to get stronger. He knows where the defense is coming from; he knows what the defense witnesses are going to say. Any holes in his case, if it's possible to be patched up, have been patched up. That's what happened in Perry Jackson; that's what happened in other cases where that happens. Unfortunately, we are in a certain fiscal crunch. I think every Senator on this committee knows that better than I do. One of the unfortunate fallouts from that is that our prosecutor's offices are staffed probably at a level that is below what they should be. When you give a defense attorney more cases than he should adequately have, you are going to have the chances of an injustice happening. When you give a prosecutor less time to prepare and more cases than he should have, you are going to have a chance that a case is going to be ill prepared and ill presented the first time it happens. I think you ought to seriously think about what you're going to do in that respect as well. Perry Jackson --

I happen to know that case. The defense attorney that tried it is a close friend of mine, and he is one of the public defenders that I supervise. That young man has been found to be guilty of four counts of first degree murder. He would be on the streets today in the same neighborhod where the jury said he committed those four murders had this legislation been in effect. That's something I think is very sobering.

CHAIRMAN: Let me suggest at this point that in listening to all of this I am in a great state of doubt that anything is being proved. The proposal is to increase -- the proposal would increase the risk to the defendant of conviction. The proposal presumably would increase the risk to the state of an acquittal. The proponents come in and conclude that this proposal is a benefit to innocent victims, that by convicting more people, by moving the process faster, by reducing costs, you are going to benefit innocent victims. You come in and you argue that it's a detriment to innocent defendants. I haven't seen either side prove its case -- I haven't heard either side prove its case. I don't know the answer to that question.

MR. BARDSLEY: I think that answer is what you should be here about. I think everybody has said that. Before we change 600 years and let 48 of the other 50 states do what we have done since the institution of this state, we ought to have more data, more empirical information on which to base this judgment.

CHAIRMAN: You're taking the conservative position, that we should not make a change until the case is absolutely proven that we should make the change.

MR. BARDSLEY: Absolutely. On something as.....

CHAIRMAN: Because the system that we have now is so good, even though it regularly convicts innocent defendants?

MR. BARDSLEY: I want to get away from regularly convicting innocent defendants.

CHAIRMAN: Occasionally, intermittently.....

MR. BARDSLEY: OK. I agree with that. Now that may sound to you to be a logic less than compelling. But it's a truism that we are all human beings and human beings are the ones that make the system work or not work. As long as it is peopled by human beings mistakes are going to be made. In the United States, I think we have correctly placed a high value on personal freedom. Before we change what we are doing now and lessen the prospects of somebody, or greaten the prospects, that somebody would lose their freedom, unjustly we ought to have more information than I've seen presented to this panel.

CHAIRMAN: I understand that argument, and it works nicely in a courtroom. You are a Legislator sitting here, and you say to yourself neither side on the merits has proven its case, but the public out there by 72%, or whatever, has the perception that the current system is detrimental to innocent victims and potential victims in our society. They want us to act. Now we exercise our judgment on the

merits, we also respond presumably because we are accountable to the electorate. So, isn't it likely that unless you came up with an argument to tell us why we should not move in this direction, that many Legislators will respond to the political polls and say, "Well, the public perception is this, it's a gray area, why shouldn't we go ahead and do it and act as representatives?"

MR. BARDSLEY: I have two answers to that. Number one, I think, again -- we're really talking philosophy now, as a Legislator you have to answer this yourselves as individuals, I suppose. As a Legislator do you impose your own judgment and knowledge that you get from studying issues, listening to testimony, observing the system, or are you simply a conduit for the public will in all instances? As I said, each of you I think has to answer that question.

CHAIRMAN: I think in the judgment issue -- when the judgment issue is in doubt, isn't the Legislator's responsibility to advance the will of the people?

MR. BARDSLEY: I think, on the issue that we are talking about today, to me which is fundamental to our system, our scheme of criminal justice in this country, something that is so fundamental, I would think before I would go and put this to -- as you know I think it's been proven over and over again -- a Gallup poll shows that most of the people in the country would give up the Bill of Rights if it was stated to them. That's something that.....

CHAIRMAN: That isn't before us today.

MR. BARDSLEY: Well, this is very close to one of the

issues, isn't it? I think -- parenthetically, I think it very interesting -- this was a plurality decision by the United States Supreme Court that allows this 10 to 2 verdict. One of those Justices -- Justice Blackmun, a conservative Supreme Court Justice -- said he thought it necessary to write a concurring opinion saying, "I think this is constitutional, but I want to make sure that everybody realizes that were I sitting on a State Legislature I think this is bad policy, and I wouldn't do it." Now I think that's something that, again, you should bear in mind. This is Justice Blackmun, a conservative Justice of the United States Supreme Court, and but for his one vote we wouldn't even be here today, because the issue wouldn't be before us. So, it's that fundamental, and I think the change so fundamental an aspect of our law we ought to have more proof than I've seen. Mr. Philibosian says I get these statistics by walking down the hall and talking to my attorneys. That's pretty weak evidence I think for changing our whole system of justice.

CHAIRMAN: I appreciate your response.

MR. BARDSLEY: Thank you.

CHAIRMAN: Thank you very much for being with us. Professor Leo J. Flynn.

PROFESSOR FLYNN: Mr. Chairman, Senators and members of the staff. I gather what you want to talk about is my research, since apparently that's the major piece of empirical data before you. Under contract to the Office of Criminal Justice Planning back in 1974 the same issues were before Legislators and Criminal Justice Planners, and the question asked was, "What do we know about hung juries and

can we get any empirical handle on the problem?" So, we had the same data void that you seem to be facing today, so we attempted to find out how many hung juries there were and what we could find out about them.

What we did is we had three types of data we used for our study. One, was information reported by the superior courts to the Administrative Officer of the California Courts; ond piece of data was local superior court information kept; and the third was data we had to construct ourselves. First of all, at the time we did our study in 1975, most counties could not tell you how many hung juries there were. They could tell you how many verdict juries there were, and how many "other" verdicts there were, of which hung juries were a subset. So, we had to go and pull the minute orders for each and every case that was on "other" and determine which cases were legitimately hung juries and which cases were cases where the defendant died or something happened in the meantime. So, we were able to come up with some 1000 trials that we identified as hung juries, 900 and some odd of which we had useful information on. And this is for three years -- 1971, '72 and '73. This was out of a total of nearly 8,200 some odd cases. We attempted to make some comparisons between the data we have on hung juries and the verdict juries -- the juries which came in either to acquit or convict. And I can see that you all want to go to lunch, so I'll attempt to indicate what we found.

We attempted to ask some of these questions.....

CHAIRMAN: Quite to the contrary. We can come back after

lunch if we need to or we can run over I think without a problem. No, we are not -- we are listening to you.

PROFESSOR FLYNN: Thank you, Senator. What we attempted to do. First of all, we attempted to find could we -- from the data we had on defendants and on crime types--could we, for instance, could we confirm District Attorney Philibosian's feeling, or opinion, or conclusion, I don't know where the evidence was. But, let's say it's a popular feeling among prosecutors, and others, that sexual crimes inordinately are more likely to end up in hung juries. Well, we found some slight evidence, but when we took all the crimes and disaggregated them by property and different types, it wasn't strong enough statistically to be able to say, "Ah, this sample, this shows that sexual crimes are more likely to end up in hung juries than any other kind of property, personal crimes, or other crimes." I mean, I'm not saying it didn't exist, I'm just saying our data base didn't indicate it.

Then we attempted to ask the question, "Ah, what about race? What about minority status, at least the kind" -- we obviously couldn't look at all kinds of minorities, we could only look at race and sex, and to some extent criminal background, and again we couldn't detect anything in our analysis of the different variables which would indicate that the defendants in hung jury cases are any different from the verdict jury defendants. So, in other words, the system doesn't seem to show that any type of crime or type of defendant is singled out.

Then we attempted to go on with our study and attempt to look at the cases, because we couldn't tell anything from this, and see how long the case took. Yes, all the hung jury cases deliberated longer than the average verdict jury, even by crime type. But, that's not surprising, because you require unanimity. Normally the judge under California law will send the jury back. So, we found, yes, they can consume more time, but from that we were unable to conclude anything other than they took more time. We didn't have any data which would tell us, was this the result of an irrational or biased juror, or was it the result of a conscientious juror? Obviously something you would like to know, and I would certainly like to know. And, then as others have said, what we found about the disposition is that the average jury in our sample was sent back at least twice by the judge. This obviously was quite different from the sample of the 8,000 verdict juries. We found that only about 10% of those cases involved the jury being sent back. We found that of the hung juries, of the 900 and some odd hung juries that we had, 40% of those juries -- of those cases -- were later dismissed. Now we don't know why they were dismissed. The data simply wasn't there, but this is the kind of information I think a future study would want to have. Were they dismissed because witnesses were tired, intimated, memories were cold, or were they dismissed because these are cases in which consideration by the prosecutor indicated that they were unlikely to subsequently result in a verdict, or at least in a probable conviction. We don't know. There is no

way we could answer that. We simply know that 40% of these cases disappear after the original dismissal of this jury before it reached a verdict.

Of the remaining cases 34% of the defendants pleaded guilty. Another 30 some odd -- I'm sorry. 26% of the remaining cases are acquitted, and the rest are convicted. So, a very small number are convicted on a second jury trial, though over 60% actually are convicted of some crime -- either by pleading guilty because they know what's going to happen, or because they are offered a deal, or convicted on second retrial. And that's essentially what we were able to find. As I said, I think our great finding was to be able to find out how many juries there were that hung. We attempted to make some estimates on cost, and I certainly would.....

CHAIRMAN: Professor Flynn, before you get into costs. Were there any statistics on how many hung up on the direction of acquittal and how many hung up.....

PROFESSOR FLYNN: Yes. I'm sure you are very interested in that. I want to refresh myself here. Yes. We found that in 62.6% of that whole sample the juries were hung in the direction of conviction. In 27.2% in the direction of acquittal, and we have breakdown for each pairing. For instance, 15.7% were 11 to 1 for conviction; 13.6% 10-2 for conviction. So, if you take those together you get over 29%. In other words, you would increase by 29% the cases that would result in a conviction. On the other hand, for acquittal we have 5.9% were 1 to 11 -- or 11 to 1 for acquittal, and 3.7 were 10-2 for acquittal, which gives you approximately 10% that would

result in an acquittal verdict. And the others would all fall below the level of cases that would permit either kind of a verdict, and under the proposal of SCA 10 would result in automatic dismissal of the case.

CHAIRMAN: So, if you went for example to 11 to 1 or 10 to 2 the percentage.....

PROFESSOR FLYNN: About 30%.....

CHAIRMAN: 30%?

PROFESSOR FLYNN: .....more verdicts.

CHAIRMAN: More verdicts in the direction of conviction?

PROFESSOR FLYNN: Yes. 30% -- about 30% more convictions and 10% more acquittals. And the difference in that number I gave you -- 40%.

CHAIRMAN: It would be 30% more convictions and 10% more acquittals. I'm looking at your data.

PROFESSOR FLYNN: Yes. I'm sorry -- it's 40%, right. So, there would be a total of 40% more verdicts.

CHAIRMAN: Of the 40% more verdicts, three-quarters would be in the direction of.....

PROFESSOR FLYNN: Three-quarters would be in the direction of conviction.

CHAIRMAN: I'm sorry, Richard. You had a point?

MR. THOMSON: You're talking about percentage of the number of hung juries, not of the total.....?

PROFESSOR FLYNN: No. Not at all. That is a well taken question. In other words, that's the percentage of this sample of 900 and some odd cases that we're talking about. It would not be 30% more criminal convictions in California. It would

still be a very miniscule number overall, if this data is still valid today.

CHAIRMAN: Why don't you continue. I just.....

PROFESSOR FLYNN: Well, the only other thing is that we attempted to make an estimate of time and cost and this estimate is simply based on the best approximation we could make at the time. We used data from the Executive Officer of the Los Angeles Superior Court, Frank Zolin, at the time, who costed out a courtroom time in terms of the judge, the jury, the attaches, the bailiffs, the actual physical facilities, in dollars and we looked at time consumed -- actual time consumed by our cases as compared to time consumed by the average verdict case, and we found that nearly $7 million was the cost of all these 900 cases, based on the statistics. Now, remember this is the Los Angeles County and we included in this 9 other counties where the cost might have been different. The time I think would be different. The 978 hung jury trials we studied consumed more than 2,912 days, about 10% more time than the verdict juries, and that led us to the nearly $7 million figure. I wish I had more conclusive information to draw from this, but.....

CHAIRMAN: Is it then valid to approximate by using a 40% of that $7 million to conclude that if those juries, under a 10-2 system, had not hung you would have saved $3 million?

PROFESSOR FLYNN: It's valid if you accept this as a valid approximation, and I'm sure people would quibble. Some people would probably -- say Solano County, which is one of the counties in our sample -- I believe is one of them -- would probably

say the cost isn't as high, there might be some difference, but I think it would give you the best approximation you can get. Now you might, if you assumed this data as valid today, I'm sure the Rand Corporation which has done more recent studies, might be able to give you a cost figure that's closer to the mark.

CHAIRMAN: OK. I should again underline that we are talking about this statistical pool and the $7 million cost to approximately try those.....

PROFESSOR FLYNN: Right. People wanted to know this.....

CHAIRMAN: Richard says that's not correct.

MR. THOMSON: You wouldn't save $3 million, because that amount would have been spent to try the cases.....

PROFESSOR FLYNN: Right.

MR. THOMSON: .....that came from the verdict. The savings would be, a) the cost of the retrials, and I don't know if the Professor has the figure for that or not; and
b) the cost of the additional jury deliberations which I suppose would be significantly less than $3 million.

PROFESSOR FLYNN: Right.

CHAIRMAN: You're saying because not each case would be retried, the $3 million figure would not apply.

MR. THOMSON: Right, because that money would have been spent in the trial that came to a verdict under the 10-2 proposal.

PROFESSOR FLYNN: You are quite accurate. We simply looked at those cases and how much they cost, using the time. Then we said take a 10% figure of that -- we assumed that's the

incremental cost for the total trial days we have on the first trial, and that would be a saving, and then add to that the subsequent trial -- about 60% of cases that are tried again, and I can't remember if we have data. This document, by the way, you made reference to the article I published in Judicature. That came out of data which we generated in an empirical study of the frequency of occurrence, causes and effects, and amounts of time consumed by hung juries, which was done for the Office of Criminal Justice Planning in 1975, and the data base is still available to you.

SENATOR DAVIS: Mr. Chairman.

CHAIRMAN: Senator Davis.

SENATOR DAVIS: Are you a lawyer, Mr. Flynn?

PROFESSOR FLYNN: No, I am not.

SENATOR DAVIS: It was very impressive to hear you stick with the facts. I just wish that they would get law professors to be able to relate to facts. After all in a criminal trial that's what it is supposed to be about, we get such a plethora of emotions and philosophy, cultism and so forth, that it's torturous trying to dig the facts out. I want to commend you for maintaining your scholarly objectivity. It was very impressive.

PROFESSOR FLYNN: Well, thank you, Senator. I wish I had more information. I'm surprised that having continued to follow this research, how little there really is -- I mean it's a difficult area to research and understand, and I certainly hope that your renewed interest will generate attempts to get, if nothing else, to get more detailed data, which I am sure is very valid. The District Attorney comes here and says,

"Look, I know this happens all the time," and I have no reason to believe that he is wrong. Now we want to know how much of the time we would want -- I hope to get to those cases early enough so maybe we could learn more about the specifics of the case, and maybe if you could convince some district attorneys to set up a system to detect hung juries early, that the state agency or scholars might be able to develop at least more detailed information than I'm aware that exists today.

CHAIRMAN: According to an earlier witness, if I'm paraphrasing him correctly, there is no need to delay for the establishment of further empirical basis for this movement, because the polls are so overwhelmingly clear that were that data available and were a public education campaign to take place, it's doubtful public opinion would shift very much. What are your feelings on that?

PROFESSOR FLYNN: I really don't know if public opinion would shift. My only comment is, being conversant with polls, I have to be somewhat dubious about the authority of the polls at this point. I'm not saying people didn't answer in this way, but it's like taking a poll before Prop. 15. If you had taken one early you'd find somebody'd come back and say 70% of the people favor gun control. I'm not saying this necessarily came out this way, but, of course, after Prop. 15 the public completely swung around. My guess is that this is the same kind of issue that complexity would lead to change. I don't know what direction the change would go. So, I'm not against the polls; I don't think they are invalid, but I probably

think on an issue as complicated as this they are not very directive in and of themselves.

CHAIRMAN: Any further questions of Professor Flynn?

SENATOR PRESLEY: Mr. Chairman.

CHAIRMAN: Senator Presley.

SENATOR PRESLEY: You referred to the Rand Corporation study.

PROFESSOR FLYNN: Well, Rand has done a number of studies.

SENATOR PRESLEY: Not one on this specific.....

PROFESSOR FLYNN: No, sir. But, what they have done, both in civil and I think in criminal cases, they've probably got the best cost data. They've done a lot of studies both for the state, but many more for the federal government, in which they have had to gather information. So, when someone asks what would seem to be a fairly simple question, "how much does a trial cost?" Well, you get on the telephone to Frank Zolin, or to the Clerks of any of these municipal courts and you will find how unlikely you are to get a fairly straigh-forward answer to what seems like a simple question. It turns out -- when you push it it turns out that the question is more complicated than I naively assumed it was when I asked. But, Rand, I think, has probably the best data on asking that kind of question.

CHAIRMAN: Thank you very much for being with us this morning. Unless there is serious objection on the part of one of the witnesses, we are going to break for lunch and come back at -- we will resume again at 2:00 o'clock p.m.

CHAIRMAN: OK. We will resume with our hearing. Our last witness was Professor Flynn and we will now hear from Greig Fowler.

MR. FOWLER: My name is Greig Fowler. I'm President-elect of the California Trial Lawyers Association. I'll be taking office on December 1. This, as I'm sure you all know -- the members of the committee -- is a civil plaintiffs' trial Bar composed of approximately 5500 members. We speak strongly, very sternly in opposition to anything but a unanimous verdict in criminal cases, in this state or anywhere.

At first blush it might seem that any proposal that would lead to increased efficiency in the courts, and to possibly help the tremendous backlog in civil cases would be appealing to us, but, in this particular case justice sacrificed at the altar of efficiency, in this case, is not satisfactory to us. I have been briefed on what Professor Uelman has spoken on this morning, and I am in agreement with his proposals and do not intend to rehash them. I would like to emphasize something that I personally think is very important and should be considered by this committee. The thought of having less than a unanimous verdict, taking someone's liberty away with only 10 out of 12 agreeing beyond a reasonable doubt, or turning the coin over, acquitting somebody who may be guilty by this same burden, does not seem proper. It has been our experience -- my case, 18 years of practice, almost exclusively in civil cases, and in speaking with many others, that jurors who may vote in a poll that they would wish to see less than a unanimous verdict in a criminal case to promote efficiency,

when these jurors are actually put to the task of deliberating, that's a very important word to consider -- the importance of deliberation -- they take this task very seriously, and the thought to us, again of having someone incarcerated or acquitted based on only a five-sixths verdict does not seem proper. I just want to emphasize that jurors take their job, I would say, 99% of the jurors take the task very seriously, and to eliminate these inalienable rights based on some sort of a five-sixths verdict, or possibly getting the ball rolling to something even less than that, is not acceptable and is not consistent with the justice system in this country, the greatest justice system in the world, that the world has ever known, that this country has built up. Societies and countries are judged by how they treat their accused, and I think that any dilution in the finest jury system, the finest system of justice ever created by man would not be acceptable and would not be proper and right. So, I would ask -- we just register our very strict opposition to this proposal. Thank you.

CHAIRMAN: Can you respond to a couple of questions? Senator -- is that Senator Davis? Senator Davis.

SENATOR DAVIS: Are non-unanimous jury verdicts allowed in civil cases?

MR. FOWLER: Yes, and that would be 9 out of 12, and that has been in effect for some considerable period of time, and my response to that, we are dealing with the type of cases I handle, amounts of money or transfers of property, or whatever, and that's the way the system has been. When you talk about personal liberty, you know, incarceration.....

SENATOR DAVIS: My next question about the non-unanimous civil verdict, what was the position of your Association at the time that legislation was pending?

MR. FOWLER: I don't believe that our Association was in existence when that was put in effect, because we have been in existence since 1962 and it is my belief that the non-unanimous jury long preceded that, sir.

SENATOR DAVIS: Do you think the civil defense Bar, if they had the option, would go back to unanimous verdict away from the 9-3?

MR. FOWLER: I can't answer that, because it has not been proposed. I think we are just dealing with apples and oranges, Senator, when we are talking about this type of thing. It could be that what is proposed here is more efficient, but I think in one case you are dealing with apples and the other thing with oranges, and that's why it's.....

SENATOR DAVIS: As the plaintiff's lawyer you like the 9-3?

MR. FOWLER: The 9-3 is acceptable. I would have no problem with the unanimous verdict system in civil cases.

SENATOR DAVIS: You don't think it would have made any difference in whether or not you win a case?

MR. FOWLER: I think the system might be a little more efficient in certain cases, but I think -- really when you get down to a jury talking about amounts of money, and so forth, they can basically come to an agreement. When you are talking again about a person's liberty I think it's a different thing entirely.

SENATOR DAVIS: Well, isn't talking about their livelihood and their property, and so forth, also an extremely important thing?

MR. FOWLER: It certainly is. There is no question about that. But, I have heard no great opposition to the system as we have it now from our members going through the years. So, that's something I've not considered.....

SENATOR DAVIS: There is all kinds of criticism, especially from the defense Bar, that thinks that what's happened in the courts in terms of justice for the defense has been terrible, and your Association slams down and kills any kind of decent product liability reform, and you like it, you want it your own way, and you get it that way. I want to commend you for the effective.....

MR. FOWLER: Well, Senator, what we want is safer products and less people injured -- that's what we want. It may put us out of business, but -- and we think the most effective way to -- one of the most effective ways to do that besides legislation is to let the manufacturers know that if they put a defective product on the market that injures somebody, they are going to have to pay for that. If they don't put a defective product on the market they have nothing to worry about.

SENATOR DAVIS: Would you support legislation for an innocent warehouseman or wholesaler who doesn't tamper with anything, and doesn't know anything about it, to protect him from being dragged in by trial lawyers and those people having to put up sums of money for five and six and seven years to defend

themselves and then they are exonerated?

MR. FOWLER: Well, Senator Davis, I personally wouldn't do that, because that would go against the entire philosophy of the Products Liability Law as it has been developed by the courts over many years -- the Henningsen case back in 1910; the Greenman case in 1962 to more subsequent cases. What we have gotten from that are safer products.

SENATOR DAVIS: But, you have a lot of innocent people -- warehousemen, wholesalers who are harmed in the process. I hope to see the same compassion for them that you have for the criminal defendant, when you take over on December 1.

MR. FOWLER: And I might add that we do have unanimous verdicts in civil cases in federal courts, and we live with that and we don't complain about that. Thank you.

CHAIRMAN: Senator Presley.

SENATOR PRESLEY: You said we have the finest justice system in the world -- I don't know if that's true, but I hope it is. I guess the answer we always have had after we make that statement is "Justice for whom?" And would you say that the present system is skewed in favor of the defendant over the victim?

MR. FOWLER: No, I don't think so. If we are staying within the parameters of the legislation, the amendment that is proposed, no, not at all. You are simply asking 12 peers to listen to all the evidence, to reasonably deliberate, and to come to a decision, and as you know, the amendment as proposed by you, sir, would cut both ways. As I say, there would be acquittals when there might not should be.

If we don't have this full deliberative process -- oh, sure there are efficient ways of doing things. I mean they have very efficient ways in Russia.....

SENATOR PRESLEY: I don't question that statement. You're talking in terms of dollars, but this probably would be the more efficient way (inaudible) . We are concerned whether or not real justice is being done for the victims versus the defendants. We had a discussion this morning about all the restraints that are placed on the process of the system, the investigative procedures, the introduction of evidence, juries, all those things seem to make it very, very tough to convict the defendant beyond a reasonable doubt. But, it seems that we get to the point where the victim has lost out there, and they are raped and they are murdered, they are burglarized, and they are robbed, and they have to suffer from that, and they'll probably suffer, at least psychologically, for the rest of their lives, and this person in many cases gets off and goes on about his business.

MR. FOWLER: I agree with all of these things. I know there is a hue and cry about these things, and we are all very sympathetic with the victim. But, again, when we get down to the point of the accused and what should be done when the accused is tried, and it just sticks in my craw, this idea that this person will either be acquitted or convicted when there are two -- and I like to consider all jurors reasonable people -- some may not be, but we have to when we approach this bill consider it that way -- that two reasonable

people or one reasonable person listens to all the evidence and does not agree, that person should either be acquitted or convicted.

SENATOR PRESLEY: Maybe those people have reasons other than the evidence.

MR. FOWLER: They might. We can never know. We can never know what has gone through the minds of all the jurors in all the cases we've even tried or heard of. We can never know that. We can only come up with what we consider to be the best system, which I think we have now in terms of trying criminal defendants, and if there were a better system in another society, another country, certainly someone would have come ahead with it. But, as far as lessening that burden to either convict or acquit, that's not the answer.

SENATOR PRESLEY: There were two states that have.....

MR. FOWLER: I heard that. Louisiana and Oregon. I heard that.

SENATOR PRESLEY: Are you familiar with what their results have been?

MR. FOWLER: No, I'm not. I'm sure that there has been a greater efficiency; I'm not sure there have probably been less hung juries and less retrials, and I'll concede that.....

SENATOR PRESLEY: If we had, in those two states, and I'm not sure either, but, it seems to me if in those two states they found themselves doing a lot of injustice to the defendants, that they would change back. Louisiana, for example, they testified this morning have done this since 1898; and Oregon, I think, since 1934. So, if it's so bad that you

run the risk of thwarting a good criminal justice system, you think they would change back.

MR. FOWLER: Well, things are rarely changed back once they are put in. I cannot speak for the experience in Oregon. I know that in Louisiana the system started out when Louisiana was originally a territory of France. The defendant was presumed guilty until proved innocent. They still use the French civil law which is the French burden. At least they've come far enough where the burden is put on the prosecution. It may not be unanimous, but they did show some progress certainly since the time of the Louisiana Purchase.

SENATOR DAVIS: You disagree with Napoleonic justice then?

MR. FOWLER: Yes, I do. I like their wine; I don't like their justice.

CHAIRMAN: We have a poll that was presented to us. The question was asked, Proposition 1 allows conviction on a jury vote of 11 to 1 or 10 to 2. The death penalty is not involved in those cases. The vote was more than 3 to 1 in favor of that particular proposition. So, I have a group of constituents who come up to me and say, "3 to 1, and more than 3 to 1 we favor going to an 11 to 1 or 10 to 2 jury." And I respond, "Well, that's not a good idea because....." And they want to hear an answer in 25 words or less. How would you complete that sentence?

MR. FOWLER: Well, I would just -- I alluded to that by simply saying that those that would answer a poll are in a frame of mind where they are concerned about law and order -- we all are -- they are in a frame of mind, but they should be

in a different frame of mind if they were sitting on a jury, or if they or one of their loved ones was accused of a crime. And again it gets back to the fact that it's just unacceptable to take someone's liberty away without unanimity. Answering a poll and sitting on a jury are two different things.

CHAIRMAN: But, concluding that it's unacceptable doesn't provide the why? If I tell them now that it's not a good idea, they are going to say, "Well, why not?" Well, I'm going to say, "Well, because it's unacceptable." What do I tell them?

MR. FOWLER: Well, you can go on about the foundation of our traditions for justice and due process. You can tell them that the system that we have developed in this country provides a safeguard by this unanimity that an innocent person is not going to be convicted unless 12 of his or her peers agree upon it to a standard which we call "a reasonable doubt to a moral certainty," and that is an important safeguard to have in our society. You may not, as an elected official, want to say this. It may result in certain cases, and it undoubtedly has, in certain guilty people going free. But, the important thing about our country and about how it was founded, and how it has progressed, is that the innocent person is not put away, is not put to death, or incarcerated, as so many innocent people have been in totalitarian societies.

CHAIRMAN: But, when guilty people go free, aren't innocent people placed at risk?

MR. FOWLER: There's no question about it.

CHAIRMAN: So, which innocent individual.....

MR. FOWLER: We can't assure this by having less -- that

it's going to be better by having less than a unanimous verdict, because you can certainly make an argument that guilty people are more likely -- could be more likely to go free if you don't have this unanimity on the jury. You just keep on turning that coin back and forth, and it works both ways. I'm not saying that we should have 20 people on the jury, or 6 as we have in federal courts, but in the process -- and I'm just going by the assumptions. I believe in this very truly, having talked to jurors -- you spend a lot of time when you lose a case talking to jurors, I think more than when you win one, about how they felt, and they just take this task so seriously. I think we can ask for nothing better than to have 12 people taking that task seriously, and talking among themselves, all twelve of them, and coming to a unanimous verdict.

CHAIRMAN: Thank you. Sheriff Block. Sheriff Sherman Block.

SENATOR PRESLEY: Mr. Chairman, just a little commentary.

CHAIRMAN: Senator Presley.

SENATOR PRESLEY: We hear the same thing all the time, that it's in the interest of the accused, safeguards, and tradition and all that seems to indicate that if they rode heavy on the side of the defendant rather than the victim, and the only thing historically and traditionally, meaning, I suppose that because it built itself up over the years, it's perfect, it can't be improved upon. Just a commentary.

CHAIRMAN: Thank you. Sheriff Block.

SHERIFF BLOCK: Thank you. Mr. Chairman, members of

this committee, I'm here to express my support for SCA 10 and for the concept of less than unanimous juries in all but capital cases. This particular provision is an integral part of the initiative that is currently in circulation gathering signatures, in which I have played an integral part in development and the support of that effort. And the reason for my support of this proposal and certain others, is that in the 28 years that I have been in law enforcement as a member of the Los Angeles County Sheriff's Department, I have seen many changes take place in the administration of criminal justice, in the conduct of carrying out the public safety responsibility, and among all of these changes I think the most significant has been the ever growing complexity of the criminal trial process. There has been what I perceive as a movement away from a search for the -- a legitimate search for the truth toward a search for technical imperfection. I believe that our current jury system enhances that search for technical imperfection. We have a system wherein we select 12 persons from the community, persons who are of average intelligence -- at least we expect the juror to at least be of average intelligence -- persons who are subjected to large amounts of testimony, some of a very technical, highly emotional nature . They view exhibits which likewise are of a highly technical nature at times. We then require these people to adjourn to a jury room to deliberate and to come to a single mind before we have a verdict. Then the same matter proceeds up through the appellate system, and at each of the court levels, be it the Appellate Court or the

Supreme Court, where we have very learned people, all we require is a majority of one in order to render the final decision.

What I have seen happening with the trial process, particularly with the jury process, in the criminal courts of this state, has been what I can only refer to as a perversion of the original intent of the system. I'm talking about this growth of the new profession, if you will, of jury consultants -- individuals who go out and conduct interviews in communities; individuals who monitor trials in progress; who develop computer programs, establishing profiles of individuals who voted for aquittal or conviction in a particular type of case, or a particular charge was alleged, and then to assist the attorneys in trying to select the jury as close to the profile that has been established as possible to try and benefit the person charged with the crime. Recognizing that even one such person on the jury, which may result in a less than unanimous verdict, could cause the process to be declared a mistrial and to start all over again.

Now, I've heard it referred to in this hearing, and certainly in other debates on the issue that I have participated in, that this is the kind of process that takes place in totalitarian countries. The President of one of the Bar Associations said that in Communist Russia they have speedy trials. I, first of all, resent the inference of any comparison between what is being advocated here and what goes on in the totalitarian countries. The State of Oregon, which you referred to, by any standard may be the

most liberal state in the United States in dealing with individual rights and the administration of our criminal justice system. They have found that their less than unanimous jury verdict -- 10-2, 11 to 1 -- works very well for that state. There have been many articles written by the appellate justices of that state commenting on the validity of that process. I might also submit that in this county, based upon my own experience, where there have been verdicts of 10-2 or 11 to 1 for conviction, that probably in virtually 100% of the cases, there has either been a retrial for the finding of guilt or a plea of guilty to the charge and where there is a 10-2 or 11-1 split verdict for acquittal there has probably not been a refiling of the charges. So, I believe that, while this less than unanimous verdict will in fact eliminate the requirement for new trials in a number of instances, it will not in any way affect what is the current administration of criminal justice, either in this community or in this state.

CHAIRMAN: Any questions of the Sheriff? If the purpose is to weed out the juror who is unresponsive to the evidence; an obstinate juror; a juror who isn't capable of understanding the evidence; a juror who perhaps is corrupt in some fashion, I take it that that is a sufficiently rare circumstance that the likelihood of having two on the same jury is quite small, and if so why do we have to move to a 10 to 2? Why wouldn't an 11 to 1 suffice to weed out that occasional juror that cannot play a part in the system?

SHERIFF BLOCK: Because we have a track record that has been established in the State of Oregon that we have some

place to look where this process has been in existence for a number of years, and has worked very effectively in the State of Oregon. It does have in fact a 10 to 2 requirement.

CHAIRMAN: But, we have 48 other states that use the unanimous verdict that we can look to and say, "Well, the system seems to work OK in those states." Is there evidence that Oregon works any better that those other states?

SHERIFF BLOCK: I don't know that it works any better, but I believe that such a system would improve the administration of justice in the State of California and that is what I'm interested in.

CHAIRMAN: OK. But, then I'm asking you why? And if the reason why is that you get an occasional person who is statistically unable to handle the responsibilities, or is unwilling to do so, why do you need to have two such spaces on a 12 person jury? The likelihood of having two is probably very, very small.

SHERIFF BLOCK: You may be right. But, again I refer to Oregon and refer to the United States Supreme Court that has ruled that 10 votes for conviction or acquital are adequate to provide and meet all of the constitutional requirements, all of the safeguards that have been established, and I believe that since the Supreme Court has spoken, and has made that statement, then it would be appropriate for California to follow that provision. One of the things that troubles me is that what I have been hearing from many of the opponents of this proposal is that, even though the United States Supreme Court has ruled upon the constitutionality of

this proposal that it was being advocated as such a dramatic break with tradition. Yet, it's interesting when decisions have come down from the United States Supreme Court that have had a dramatic impact on our ability to provide for the public safety of this community, decisions which have had dramatic breaks with tradition, I have not heard the hue and cry about forget what the U. S. Supreme Court said or forget about tradition Let's go with what the Supreme Court has indicated, and that's what we're doing here. I believe that the right to trial by jury of peers is being met; I believe that five-sixths constitutes a verdict beyond a reasonable doubt; I believe the moral certainty aspect is being met; and obviously the United States Supreme Court believes the same thing, and who am I to quarrel with the United States Supreme Court on a matter if it's of constitutional importance.

CHAIRMAN: You mean you've never questioned the wisdom of the Supreme Court decisions?

SHERIFF BLOCK: I certainly have, but the point that I'm making is that you can't have it both ways. We have been told that we do not enjoy the luxury -- or should not enjoy the luxury--as law enforcement of enforcing the law or doing our job based upon those laws that we agree with, or those decisions that we agree with. I submit to the opponents of this proposal that they play by those same rules and not take positions based upon what I have to believe. I guess one point I have to make -- I don't know if it's fair and proper -- but we should look at the proponents and the opponents of this thing and evaluate whose vested interests

are best served in this thing. As Sheriff of Los Angeles County I have absolutely nothing to gain by the success of this proposal or the success or failure of our initiative effort. But, I would guess that many trial attorneys in this state have a great deal to gain or lose by the success or failure of this proposal or our initiative effort, and I think that has to be viewed if someone is going to be objective.

SENATOR DAVIS: Question.

CHAIRMAN: Senator Davis.

SENATOR DAVIS: How are the signatures comong on the initiative?

SHERIFF BLOCK: Statewide they are coming in very well.

SENATOR DAVIS: So we might have to hustle to beat the initiative.

SHERIFF BLOCK: If there is to be a legislative act, I would say yes.

SENATOR PRESLEY: Mr. Chairman.

CHAIRMAN: Senator Presley.

SENATOR PRESLEY: Have you or anyone taken a look at the Oregon experience to know that it's good or bad? Has anyone done an analysis on it?

SHERIFF BLOCK: In fact the Oregon experience was studied by Steven Trott, who was then the U. S. Attorney for this District, who has since moved to Washington as Assistant Attorney General, and Steve was one of the members of the group -- the Countywide Criminal Justice Coordinating Committee which originally came up with the proposed

initiative, and the part that we talked about and referred to was the success of the Oregon experience and quoted from a number of papers that had been developed by appellate court justices within that state.

SENATOR PRESLEY: Was the initiative endorsed by the Criminal Justice group -- the one that was formed.....?

SHERIFF BLOCK: That group, the one you are referring to, does not take a stand on ballot propositions, and so forth, but the Countywide Criminal Justice Coordinating Council, which is made up of myself; Chief of Police of Los Angeles; a representative of local small town chiefs of police; District Attorney; Public Defender; City Attorney; Mayor of Los Angeles; somebody representing the other Mayors; presiding Judges of the Courts -- some 20 members. When the proposal was put before the committee for a vote to go forward or not to go forward, there was only one vote in opposition. The Public Defender voted in opposition; all other members of the Countywide Committee voted in favor of the proposal.

SENATOR PRESLEY: Is that the PJ of the Superior Court?

SHERIFF BLOCK: The PJ of the Superior Court, Municipal Court of both Los Angeles and President of the Presiding Judges Association for Los Angeles County.

CHAIRMAN: Does the fact that we are talking about a very small number of cases have any impact on your thinking on this issue? We went through some statistics earlier before you arrived that indicate that we are talking about a couple of cases at the most out of 100 that would be affected by this.

SHERIFF BLOCK: I understand the statistics run somewhere between 9% and 15%. But, the point is.....

CHAIRMAN: 10% hang up -- out of 100 cases 10 deadlock. Of those 4 are dismissed, 3-1/2 plead guilty. That leaves 2-1/2 that would be retried. So, we're talking about 2-1/2 out of 100 that would be affected by this, I think.

SHERIFF BLOCK: Well, my point is that what is being proposed here in SCA 10 is just one component of the initiative effort that we are putting forth, and we have looked at a whole range of procedures within the criminal court that all seem to delay the process of criminal justice, and do not in any way enhance the search for the truth, and a less than unanimous jury is just one of those that we are proposing, along with the judicial voir dire, the Grand Jury indictment, the whole bit. And taken in that context this is a very significant part of the overall package, and I would be somewhat of a hypocrite, I suppose, if I were to tell you that I supported it vigorously as part of the initiative and do not support it as vigorously in this context, because to be very honest with you, this whole initiative evolved behind a recommendation that I had made to the Council that we study this problem of hung juries and how to expedite it. And the thing that triggered that is because this advent of this so-called jury consultant who enables a defense attorney to work towards finding at least one juror who will hang up a jury, and then at best, or at worst, have a new trial, and at best put them in a bargaining position to try and resolve the issue with a plea to a lesser

charge. So, I believe it's a problem that will grow in frequency, and will work against what I believe is a legitimate search for the truth.

CHAIRMAN: And you don't believe 10-2 is overkill?

SHERIFF BLOCK: I do not believe that 10-2 is overkill, and I might add -- while it is not part of SCA 10, we also have in the initiative a provision that if there are 7 votes for acquital, that unless there can be a showing by the people that there is evidence available that was not available in the original trial, that would be a bar to prosecution. So, the proposal is designed to, once again, to be fair, proper administration of criminal justice, recognizing both the legitimate rights of the accused, but at the same time recognizing the legitimate rights of the rest of society, which, among other things, has to pay the bill for what goes on. In Los Angeles County the cost is somewhere between $4500 and $5000 a day to administer a single Superior Court.

CHAIRMAN: Again, you don't believe that 10-2 is overkill?

SHERIFF BLOCK: I do not.

CHAIRMAN: The reason for that is that it works in Oregon?

SHERIFF BLOCK: It works in Oregon. It is my understanding that it works in.....

CHAIRMAN: Could it be overkill in Oregon?

SHERIFF BLOCK: I don't believe so. I do not believe it's overkill.

CHAIRMAN: I understand that, but why?

SHERIFF BLOCK: I just believe that 4 out of 5, or rather 5 out of 6, 10 out of 12 is a pretty overwhelming majority, and I believe that if you get 10 people to agree -- 10 out of 12 -- that there has been a very persuasive argument made, either for conviction or acquittal, and that that addresses all of the legitimate rights of the individual who is on trial. An interesting thing -- I heard reference made by a prior witness about jurors -- I would guess that if a poll were taken among former criminal court jurors in Los Angeles County that you will find far more than the 72% favoring the proposal of less than a unanimous jury. And he referred to how serious these people take their obligation -- that would be my guess, and I do not believe I'll be wrong.

CHAIRMAN: Senator Presley.

SENATOR PRESLEY: You referred to the jury consultant, and I heard just a little bit about that. Is that something that is kind of new that is just emerging?

SHERIFF BLOCK: Yes. In fact in our South Bay Court there were two persons on trial by the name of Norris and Bitteker who were charged with the torture death of five teenage girls that they picked up who were hitchhiking; sexually assaulted them; tortured them; murdered them; and tape recorded all of those events. They were on trial with a court-appointed attorney. And I found -- well, I guess I was more than offended to find that a jury consultant was brought in from Atlanta, Georgia, a woman, who had these computer programs developed to assist the defense in the selection of jurors, based upon profiles of jurors that have sat in

similar cases throughout the country. There have been other cases where they go out, hire a jury consultant and prior to the trial the consultant will go out and conduct interviews on the street -- perhaps hundreds of people -- getting background information on them -- their age; their occupation; their income level; whatever, and then say, "If you were made aware that a male adult, 35 years old, had sex with a 17-year old girl, and she consented, although that may be a technical violation of the law -- if you were sitting on this jury would you find this person guilty of statutory rape; would you find them guilty, and then if you learned that this 17-year old female had a record of sexual promiscuity....." They develop all this information, computerize it, and they then look at the list and decide that, you know, a male white, 42 years old, and a certain range of occupation, or economic level, may be the best person to have on this jury for our side. If that is selecting a jury of peers, and if that's what was designed by the framers of our criminal court system, then I've missed something in my 28 years, I'll tell you that.

SENATOR PRESLEY: Was this -- in the case that you mentioned -- was this person paid by taxpayer funds?

SHERIFF BLOCK: Would have to be, because it was a court-appointed attorney.

SENATOR PRESLEY: Mr. Chairman, is that an extension of voir dire, a rather long extension of what has been described here?

MR. THOMSON: I think the way to get at it would be to limit voir dire.

SHERIFF BLOCK: That is another proposal within our initiative is to adopt judicial voir dire as it exists in the federal system and in most states. Incidentally, Louisiana has judicial voir dire. Ginny Foat was just tried in Louisiana, and I don't think anybody could claim that she did not have a fair trial. They started selecting juries on Monday and started taking evidence on Wednesday afternoon. If the Ginny Foat case was tried in Los Angeles County, or in the State of California, we'd be picking jurors two months from now to try that particular case.

SENATOR PRESLEY: This jury consultant sounds like a very dangerous trend. I guess it's fairly new.

SHERIFF BLOCK: Yes.

SENATOR PRESLEY: But, if it's workable -- and it probably is -- it will probably catch on and pretty soon it will be commonplace.

SHERIFF BLOCK: I certainly agree with that.

CHAIRMAN: But, are you also stating that the payment of that individual was at public expense in the case that you described? I just want to be sure.

SHERIFF BLOCK: I would guess that it was, because the legal representation was provided at public expense.

CHAIRMAN: OK. But, that's a guess.

SHERIFF BLOCK: It's a guess on my part.

CHAIRMAN: We'll check into it and find out. Thank you very much for your testimony, Sheriff Block.

SHERIFF BLOCK: Thank you.

CHAIRMAN: Robert Talcott.

MR. TALCOTT: Good afternoon Senator and members of the committee. I am Robert Talcott. I'm appearing here this afternoon as a representative of the Los Angeles County Bar Association. I might say at the outset, Senators, that the consideration of SCA 10 was given exhaustive and thorough consideration by the Trustees before they entered their vote on whether to support or oppose it. There were meetings in which the District Attorney from Los Angeles County was invited, judges from the Superior Court were invited, arguing in favor of the Constitutional Amendment. There were parties brought in that were setting forth arguments against it. These meetings with the debate went on and lasted over several days; they occurred at open meetings of local Bar leaders; and after consideration and questioning, the digesting of all of the arguments pro, and all of the arguments con with respect to Senator Presley's Constitutional Amendment, the unanimous conclusion of the Trustees of the local Bar Association -- which represents 17,000 lawyers, which isn't even all the lawyers here in Los Angeles -- about 60% of the lawyers -- but, representing those 17,000 lawyers, they met and unanimously concluded that they would oppose SCA 10; that they were not convinced; they were not impressed by the arguments.

CHAIRMAN: Senator Presley.

SENATOR PRESLEY: How many people were voting on this decision?

MR. TALCOTT: There were approximately 36 Trustees.....

SENATOR PRESLEY: 36 Trustees sat and heard all those

exhaustive arguments, pros and cons, both sides, as we have done here since 9:30 this morning, and they unanimously voted against it. That's incredible. Well, you couldn't do that on this committee, I'm sure. Just with these three members here, we wouldn't vote unanimously, I don't think.

MR. TALCOTT: You may not, but that is sort of illustrative or indicative of some type of a feeling, and it's not to say that they are against progress, against change. The sum total of the argument for this group, and they are a selective group, they are attorneys, and the attorneys are not from one practice. They cut across the cross section of practice here in the Los Angeles community. They felt that the argument to make, what they consider, a dramatic departure from the existing due process and constitutional protection of a unanimous 12 person verdict, were not compelling enough to recommend a change.

SENATOR PRESLEY: This, of course, is not to the point of SCA 10, but what kind of -- what groups or individuals came in and argued in favor of it? Did you have judges? Did you have district attorneys.....?

MR. TALCOTT: Yes, we had.....

SENATOR PRESLEY: Did you have the Sheriff that we heard from here today?

MR. TALCOTT: We had District Attorney Philibosian make a presentation; Judge Ron George made a presentation; to mention two.

SENATOR PRESLEY: They weren't even able to convince one person?

MR. TALCOTT: That's correct. It was a unanimous vote in opposition. Now, while the question put to other people testifying here today were illuminating, nobody is against protecting victims; nobody is against a more efficient system when we talk about the administration of justice. The consensus was that this did not promote a fair administration of justice. Senator Keene said, "Fill in the last line," to one of the other witnesses. "What am I going to tell my constituents, if they say to me, 'well why isn't it a good idea?'" And I don't know that this will explain it, but let me attempt to try to capsulize what some of the feeling was among the people that I represent in the LA County Bar Association.

They said, you know what this does? If you allow 10 people to make the judgment, then we could envision a situation where the jury has listened to the evidence; they are instructed by the judge; they retire to the jury room; and then they say they select a foreman as is the usual procedure, and the foreman says, "Let's take a straw vote right now and see where we stand. Let's see how far we have to go one way or the other." And everybody writes down on a piece of paper, it's handed to the foreman, and the foreman unrolls each piece of paper and tabulates the total. And you know what he comes up with? 10 for acquittal, or 10 for conviction, and 2 taking the opposite side, whatever it might be in that particular case. He said, "That wraps it up ladies and gentlemen. You've done a hell of a job; let's move on; we want to get out of here," signs the verdict and passes

it through, and there's not a -- let me finish this, sort of a fantasy kind of concern that was expressed -- and they pass it out to the Bailiff, and the Bailiff takes it in. What the parties were concerned about here, and what is really fundamental to the unanimous type of a jury verdict, is that it compells discussion, and so that if there was some holdouts one way or the other that they could not say, "Well, we are not interested in listening to your view, because we have the majority that is required, and we are going to proceed with that judgment." By requiring those 10, however they felt, to enter into a colloquy, a discourse, an appeal, a restatement and analysis of the facts, is not only illuminating to try to convince the other 2 who are holding out, but really educates some of those 10 who may have had a first impression. So, what it does is it potentially -- and I'm saying potentially because I can see situations where it may not happen -- so potentially it cuts out the whole purpose of the uniqueness of our jury system, and that is to deliberate together. And you know what a jury is told when they go back into that room? They said -- and this is what a judge says. "It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you," the judge will say, "must decide the case for himself, but do so only after an impartial consideration of the evidence in this case with your fellow jurors. In the course of your deliberation do not hesitate to change your mind or your view, or your opinion,

if you are convinced that view or opinion was erroneous." Then the judge goes on to tell the jury, "But don't do so -- don't surrender your honest conviction as to the weight of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict." What that does, it distills what we're talking about. It says -- you know what's unique about our jury system? It compells a discussion, and it's not a race for justice. I think if the Bar Association had to capsulize, Senator Presley, for you or for Senator Keene to take back to his constituents, or to Senator Davis, what we are concerned about is the 10-2 verdict has the potential of undermining the necessity and the responsibility to deliberate together in and amongst themselves.

SENATOR DAVIS: I have a question.

CHAIRMAN: Senator Davis and then Senator Presley.

SENATOR DAVIS: Have you, Mr. Talcott, heard any criticiam from the Bar in Oregon that when they went to 10-2 that tended to cause the jury to disregard the opinions of one or two jurors? Have there been any studies to determine that? Has there been any real objective analysis by any reseachers to show whether or not that has happened? I told the Chairman it's too bad we are not holding this hearing in Portland, because I haven't heard any real objective factors here, advocacy on both sides, most of the Bar being absolutely negative. You fellows remind me of Chiefs of Police of 20 years ago, when people pointed and said, "You fellows cause the riots," and I said, "No, we don't, we're perfect."

Eventually we changed a great deal, tremendously. But, the Bar today is dug in and what they have achieved as of this moment is perfection; and that may be true, but I would certainly like to have some proof of it, in that there are laboratories -- both in this country and elsewhere -- where in England, for example, where 10-2 is OK. I haven't heard one single word of any objective research by any Bar group or any scientific group, that would bolster the arguments. We're hearing arguments; we're hearing essentially arguments that are based on a fact, or a guild, or a philosophy. As noble as it might be that the innocent shall always be protected, and so forth, and yet we hear that terrible things are going to happen. But, did terrible things happen in Oregon? Oregon is a very liberal state. I have a lot of family up there, and it is not Napoleonic law as it might have evolved from Louisiana before the -- Spain had it and I guess France got it and then we bought it. Oregon doesn't have that at all. Oregon has essentially liberal politics coming across the northern part of the United States. We have more of the Jamestown coming across conservatively at the bottom down here. But, they are really liberal up there. But, have you measured anything there that would be a good footnote to your argument?

MR. TALCOTT: We have tried to measure the beer that Oregon produces, good Olympia Beer and things of that sort. But, to answer your question, Senator, no. Nobody has gone out, as far as I know -- I'm not privy to that information --

and conducted a poll or a survey in Oregon. I would suggest that these hearings certainly are going to promote the probability of a study being done, so that if there is further discord that that would -- since you and others have expressed an interest in how that experiment of long-standing has been going, I would suggest that that will probably be done at some time. I do not have that information. But, I would like to answer you this way -- I would like to answer you this way. I would suggest.....

SENATOR DAVIS: I heard a tape just quit, and I didn't want to lose any of your words of wisdom.

MR. TALCOTT: I think that there exists in the United States good justice, better justice, and the best justice, and it might vary within the criminal justice system, the administration of justice within the states. I would suggest to you that, although there may not be hues and cries of dissent in Oregon and Louisiana, that that may not be the best justice, and that's what all of us here today are really seeking for and pursuing. California is really a terrific and unique state, because we have always striven for the best in everything -- not just good. Maybe that system works in Louisiana; maybe it works in Oregon, and nobody is screaming and yelling to change it.

CHAIRMAN: I am going to ask that you keep your remarks a little bit briefer. If you can condense them just a little bit.

MR. TALCOTT: I'm sorry.

CHAIRMAN: Senator Presley.

SENATOR PRESLEY: One other -- I don't think this has been discussed today at all. You're talking about the jury getting their instructions from the judge; they go back to the jury room to deliberate; and they start in and they deliberate for a day, and everybody agrees this person ought to be found guilty, except one person. Now, I don't know -- I've never been a juror -- but I understand the pressures that come to bear upon that one person, or two people, to come around is just tremendous. And I would guess that you would have to be a very, very strong person, with some very, very strong convictions to stand up under that. If we had a 10-2 jury they could remain true to their convictions; they could say no. Now, they get beat over the head, beat over the head, and beat over the head to come around, and I'm sure all kinds of abuse takes place by those people in those juries. I don't know if that's regarded as a response, but all the other things -- when you described how we are going to diminish this system, my only point was I didn't understand how judges, and we have two very good ones that I know of, two very respected judges in Los Angeles County strongly in support of this, who deal with these trials every day, and I don't know how they can be so wrong, and how they have so missed the point that you have just described here. I can kind of understand it on the part of district attorneys. They are advocates just like you are as defense attorneys, but the judges who give those instructions, who deal with this every day, deal with juries, and they very strongly support this -- at least two of them that were here -- one of them was here this morning and another was mentioned, and I

am sure there are others.

MR. TALCOTT: I'm sure there are, and for the Bar Associaton what has occurred is that the evidence presented to require the change has not been compelling or convincing. One of the arguments that has been probably rehashed here many times, is that it's economically sound to do that. The Bar Association was not convinced that that is a substantially significant reason to change it because it saves money. Now, that may be a consideration for you, and properly so, but for people involved in the justice system they don't feel that a dollar sign should be the determination of whether or not certain activities should occur or should not occur.

SENATOR PRESLEY: Most of these other people that we are talking about are proponents, are part of the justice system, so you can't say you're involved in the justice system. You're all-encompassing like that, including everyone. You're.....

MR. TALCOTT: I mean in the group that I'm representing, they were not impressed by the monetary.....

SENATOR PRESLEY: Are all your members defense-minded attorneys?

MR. TALCOTT: Not at all. The Los Angeles County Bar Association is a voluntary Bar and there is no mandatory requirement; it is not made up of defense lawyers, or plaintiffs' lawyers. It's made up of lawyers who are interested in the administration of justice in this community, and that covers everything -- civil, and what have you. So, the argument about the dollar sign was not compelling. What seems to be the unstated agenda as the purpose of this was that they wanted greater insurance of conviction, rather than having the recal-

citrant one or two jurors holding out; that if the majority of that group 10 of the 12 feel that there should be conviction or acquittal, then that should dictate.

Part of the comments that were made that I want to pass on is that in an effort for greater efficiency, maybe it should be approached from another angle. Instead of reducing the unanimous number of jurors -- and I'm sure you've heard this -- why not concentrate on ensuring that people who get on the juries -- that the selection process might be better developed, the voir dire that we talked about. That was one suggestion.

SENATOR PRESLEY: We could expand this computer system.

MR. TALCOTT: I think that -- I have never used that; I don't know many lawyers who have. I've heard of its existence; I've also heard it's a very expensive process. But, one thing is to insure that the jurors are going to be able to deliberate and there is the aberration on the jury, this one aberrational person, that maybe you should direct your attention to a way of dealing with that prior to them getting into the box.

SENATOR PRESLEY: I hope you are not referring to the proponents, and for certain I'm one, doing what they were doing just on economic grounds.

MR. TALCOTT: No.

SENATOR PRESLEY: I think that is a small part of it and you seem to be focusing on that. I think there is a lot more to it -- the victim -- a rape case was described here this morning that was tried four times, and you can imagine the turmoil and the grief, and the pressure and everything --

every kind of emotion, I guess, that you could imagine, that the victim had to go through, and all of that. And after four trials never saw justice done. So, that's another major part of this -- it's not just economic.

CHAIRMAN: Anything further? Thank you. I appreciate your testimony. I understand we have someone from the Los Angeles County Chamber. I don't have your name on.....

MR. LESAGE: I'm Bernard LeSage, Vice Chair of the Law and Justice Section of the Los Angeles Area Chamber of Commerce.

CHAIRMAN: OK. That's Bernard.....

MR. LESAGE: LeSage. We have -- I'm here really to say that the Board of the Los Angeles Area Chamber of Commerce has considered the non-unanimous criminal jury verdicts in connection with the Speedy Trial Initiative, or the so-called "Speedy Trial Initiative," which has a few provisions which are slightly different than this, but essentially encompass the same concept. We have prepared as part of the committee a summary of our arguments which we considered pro and con. I don't know if it will be helpful for you. It might shorten what I have to say here.

CHAIRMAN: We'd love to have it, in any case.

MR. LESAGE: Our committee heard many of the speakers which you heard here this afternoon. Among others, Jerry Uelman, in favor. We discussed with many meetings the drafters of the initiative; we heard from representatives of the Police Department; from District Attorney's Office; and from the Public Defender's Office. Pretty much a cross section of all of those particular associations who have

taken various positions, including those that have talked here this afternoon. We found that this particular issue, particularly among the various other issues in the initiative, was perhaps the most difficult to grapple with, because it represents perhaps a balancing of the various principles that we rely upon and feel are essential to the justice system in the United States, together with the things which you have mentioned and heard here this afternoon -- the rights of the victims; the necessity for speedy trials; and those types of balancing processes are very difficult to weigh in a committee such as ours, which includes an appellate court justice on our committee.

I think where we came down is that, first of all, it is a constitutional provision in that the United States Supreme Court has carefully considered it and found that it is constitutional and, therefore, is fundamentally fair. It does provide an opportunity for the defendant, who is accused, to present a fair trial and to have a fair trial. Once we moved on from that point, we made the best effort we could to investigate the facts as to other states which have non-unanimous jury verdicts. We found there were four, two of which were similar to the proposal -- that is Oregon and Louisiana -- two others involving non-unanimous jury verdicts -- Oklahoma and Idaho -- in misdemeanor cases.

We weren't able to develop the facts from Oregon, as you have tried to probe from other witnesses, which establish what their experience has been with it. And I think where we came down on that particular issue was the funda-

mental respect that we had for the jury system in general, that the jurors in fact take on very seriously, to take the duty upon themselves very seriously to consider very carefully the reasonable doubt of guilt, and that we felt that the 10-2 under those circumstances would still result in a fair trial, given the fundamental trust in the jury system. The jury -- the composition of the jury has changed considerably from when it was first developed. I think you have all probably heard quite a history about it, but the changing complexion of our society and, therefore, changing complexion of the jury panels that we are faced with, seemed to indicate that you have the possibility of a one juror holdout, an unreasonable one juror holdout, or even two, is not that uncommon when we discussed it with various district attorneys and public defenders who have experience in the field, none of which -- although there was one member that was a former district attorney and a former defense attorney on our committee. We went to those people who are in the field and found that, although their experience was not extensive, they did not have a whole lot of cases that were hung up by one apparently unreasonable juror, or two unreasonable jurors -- it did occur, and it was all their experience as well that subsequent to just one or two persons who are unreasonable they would try it again, and they always won, resulting in just really a waste of time. Some of those trials are not short trials, they go on for quite some time, and there is a considerable amount of expense resulting from it. So, that sort of balancing of the expense,

the essence of the system to make sure that there is a safe trial is not an easy one. I don't know that there is a real answer, but our committee and the Board which is representative of the business community, came down in favor of the 10-2, and I think that's basically where we are. If there are any questions I can answer those, or the arguments that we considered as significant arguments before our committee are here on the written material, both in favor and against, as best we can construct them in a summary form,and that's where we came down on it.

SENATOR DAVIS: Are you an attorney, Mr. LeSage?

MR. LE SAGE: Yes, I am.

SENATOR DAVIS: LeSage means the wise one, I guess.

MR. LE SAGE: Or wisecracker, I don't know which one.

SENATOR DAVIS: In your committee did you have a unanimous verdict in favor of?

MR. LE SAGE: We did indeed, although there were two members who weren't present, and I believe one of those members probably would have voted against, or would have abstained, one of the two.

SENATOR DAVIS: I want to commend you for the scholarliness of your presentation. It shows kind of a pragmatic business evaluation of the process which I find missing from so many presentations. The Professor of Government came in. He didn't try to tell us how we should think, he tried to tell us the facts. And so I.....

MR. LE SAGE: I think that was Jerry Uelman.

SENATOR DAVIS: Yes. No -- an Irish name from Claremont.

MR. LE SAGE: We did not hear from him.

CHAIRMAN: Before you leave, I too appreciate the degree of thoughtfulness in weighing both sides of the argument and the conclusions that you came to. I'm a little bit concerned because I haven't seen -- perhaps you have -- some empirical demonstration that there are a significant number -- let's just take the 10-2 situation -- of hung juries where you have two unreasonable jurors. Obviously unreasonableness is to some extent in the eyes of the beholder, and if I were at the losing end of a case and felt there should have been a conviction, and that two people held out, I might consider their actions unreasonable, even though to those people, and maybe the rest of the world, their actions might be very reasonable. Could you give us some insight into the kinds of cases that were put before you, and whether there was actual data put before you on whether these were people who were relating situations that they had experienced, that stood out very much in their minds, because they didn't like the results and the outcome, and you had maybe a bad situation?

MR. LESAGE: Well, I'll tell you what information we did have so you can use that in your evaluation of taking our comments and our decision that was made by the Board, and that is that one of our members is Frank Zolin, who is the Executive Director of the Los Angeles Superior Court, which was our primary source for statistics on how many 10-2, 11-1 type of cases there are. He has to admit, and I think I would report to you here that there are no definitive statements in Los Angeles County which establish exactly how many of those types of cases there are that would fall within

that type of category and exactly what happened to them, because those haven't been compiled. That's not the type of information that the Los Angeles County gathers, or for that matter any other jurisdiction that he knows of, and he is fairly well versed in this area.

CHAIRMAN: Am I the only person in the world who feels uncomfortable about that? Have to have statistical data to justify the conclusions?

MR. LESAGE: No. I'll tell you where we came up -- the approximation of 350 trials is a little misnomer here, because you are a state committee. But, for us who are in Los Angeles, and Frank Zolin who represents the Los Angeles County, that's an approximation based upon his review of the statistics that are available in Los Angeles County, which have somewhat of the same premises which you expressed earlier about certain percentages of trials and knowing certain numbers and making assumptions about those numbers and figures that are available to come to this type of conclusion that in Los Angeles it would mean approximately 350 trials that would be saved with the provision that would provide a 10-2 conviction. And that is the best that we could do as far as facts and statistics for the Los Angeles County area. We are trying to grapple with the same idea -- what are we talking about in terms of time when we are trying to juxtopose that with the defendant's rights? What types of savings are we looking for in time; also what types of savings are we looking for in response to the victim so they don't have to go through the preliminary trial -- one trial has it hung

up and they come back to testify again about the blood and detail. Those types of considerations against making sure, that we all wanted to make sure that the rights of the defendant were protected, but he has fundamentally a fair trial. And when you start balancing those you can't come up with hard numbers, and we looked long and hard -- we went to Steven Trott, and I don't think he has any figures either --in fact he came to our committee -- actual figures. I think somebody in the future will, because obviously they are ascertainable, but they are not in existence as best we know it at this point in time. We may be mistaken, but we looked pretty hard for them.

CHAIRMAN: I guess one of the concerns I have in this whole subject matter area is that if you look at the hung juries and then you look at the 11-1 and 10-2s, there either is some assumption being made that an 11-1 or 10-2 leaves the one and the two people who hold out in an inherently unreasonable position, or someone has some knowledge somewhere that there are a certain number of unreasonable holdouts, and that the best that I have heard on that question is anecdotal testimony, and we have sort of an inverted pyramid being built up. Down there somewhere someone said, Yes, I know of an 11-1 case where the holdout was unreasonable and, therefore, in all these cases the holdouts are unreasonable. And yes, I know of a 10-2 case -- I haven't heard of a 10-2 case yet where the two holdouts have been demonstrated to be unreasonable. There was some suspicion given on the part of one of the judges this morning that in a series of cases

that were tried bigotry resulted in -- bigotry was the cause of hung juries and all the rest, but I'm really concerned about the scant evidence for the proposition that you've got a lot of unreasonable holdouts in 11-1 and 10-2 cases. I think you probably have some. I don't know how many are unreasonable.

MR. LE SAGE: Right. I think that's one of the problems with the premises on the numbers that we have here and recognize it as a problem, because you have to assume that that one person, if diligent, has reasonable doubt as to that person's guilt for that particular crime. The only thing that you can rely upon is really the best judgment of those people who have been involved in those types of situations, such as the defense and prosecuting attorneys, who then poll the jurors afterwards and try and ascertain as best they can -- and even then they are not absolutely certain, because that's certainly within -- something that's a subjective element and you can never even be certain then exactly what the basis was, whether it was really an unreasonable basis, or whether there was some reasonable basis for it. I think that where you have to come down on that is that where you have a situation of ten people who have seriously considered the evidence, even though there may be one or two people who have a reasonable doubt as to that person's guilt.....

CHAIRMAN: Are you talking about the decison of the jury?

MR. LE SAGE: The decision of the jury -- let's say you

get to the -- let's take a premise of 10-2 or 11-1 for conviction, and that person will be found guilty under this particular format. We'll never really know whether that person had a reasonable doubt which was justified by the evidence, or whether it was just some preconceived aspect of this person's personality which sort of led him to interpret the evidence unreasonably, or whatever the cause was, they have decided that he is not guilty. You will never really understand that no matter how long you compute those figures, and I think fundamentally you have to come to the conclusion in order to support this position -- and I think this is where our committee and the Board came to -- is that where you have 12 people making that serious effort and not taking away anything from those one or two people who are found not guilty, but you probably have a very safe and more than a safe, you have a probability, and I think more than a probability you have someone who is probably guilty, and that that person probably ought to serve a sentence, perhaps taking into consideration those other two juror's verdicts, but whatever, that person is guilty of that particular crime. I mean, that person got a fair trial and, therefore, whatever the unreasonableness -- you really can't couch it that way, because there is no way to completely ever understand that.

CHAIRMAN: Can a probably guilty person be an innocent person?

MR. LE SAGE: Do you mean could there be a mistake in the system with a 10-2?

CHAIRMAN: Isn't it more likely.....

MR. LE SAGE: It is more likely that there would be a mistake, I suppose, than if a 12-0 -- yes, and that is one of the trade-offs that you have to consider in coming to your conclusion that there is -- once you start coming down the range, that's why there are a certain number of Senators and Assemblymen. You have a certain number of judgments being rendered on a particular issue, whether it's guilt or innocence, or not. The more people you get involved in that process perhaps the better integrity you have for a correct result. But, at some point you have to say what is a reasonable judgment in a particular case where you cannot ever, even with 12 people unanimous, or 24 people unanimous, or 100 people unanimous, you still can't come to that conclusion that that person really is guilty. I mean there is always the possibility that that person was framed, that some other circumstances about him.....

CHAIRMAN: Even with a unanimous verdict?

MR. LE SAGE: Even with a unanimous verdict.

CHAIRMAN: If you dilute to some extent -- if you dilute to some extent the perfection of the decision-making process to the extent it's achievable, what are the offsetting benefits? You mention the cost benefits, or efficiency benefits, that are considered. Were there any other benefits that the Chamber in particular considered in coming to its conclusion, besides the question of cost effectiveness and efficiency?

MR. LE SAGE: Well, I think fundamentally it wasn't so much as putting a scale and adding the benefits versus

the burdens. If you come to the position that you are fundamentally going to have 12 people who are going to do the best job they can, and that this person gets a fair trial, and 10 people come to the conclusion that he is guilty, then we're satisfied as a society that that person is guilty. And I think the benefits go from all the way down the line. I mean there's money benefits obviously; there are benefits to the victims; there are benefits to resolving that issue, even from the defendant's point of view, because if you look at those figures that are available from the numbers that go back into the system and are convicted, it's very close to 100% the second time around, whether it's the perfection of the lawyer's skills, or whether you have just another jury panel, or what, there are very, very, very few instances where you have that unreasonable jury situation where the second time around the person is not convicted by a unanimous verdict jury. And I think that the integrity of the system includes a judge who is attuned to that, the prosecutor who won't prosecute again if there is a reasonable doubt, and those types of things are built into a system because there are a lot of people out there trying to make sure that just results happen. The judge is there, the attorneys are there from both sides, you have 12 jurors there, and everybody really there is trying to make sure that we only convict the guilty and that the free person is let off. I think the system is still going to work, but it will work a little more efficiently with 10-2. You know you can't -- you cannot get.....It is a philosophical issue I think to a

certain extent, and there is no hard answer that you are looking for. I don't think you are going to find the hard answer.

CHAIRMAN: I appreciate the responses, your direct responses. I think you have been helpful to me. What vote is necessary in order to commit the Chamber to a position on an issue such as this?

MR. LE SAGE: In this particular case -- I was at the meeting -- of our meeting -- which was unanimously voted.

CHAIRMAN: It happened to be unanimous. But, was a unanimous vote required?

MR. LE SAGE: No. It was just a majority. And also I don't know of any -- we had a -- we lacked a quorum the first time that this issue came up to the Board of Directors. They voted without a quorum 100% and I understand without having been there, everybody else who wasn't there eventually voted in favor of this as well. So, that the Board of Directors, which represents sort of a cross section of the business in Los Angeles County -- and those are the Directors themselves -- I am not a Director. The Chair of our Committee is a Director, but the Directors themselves are the only ones who can vote really and take a position on behalf of the Chamber for this. It is my understanding that they voted unanimously in favor of this.

SENATOR DAVIS: Mr. Chairman.

CHAIRMAN: Senator Davis.

SENATOR DAVIS: Is it true that the Greater Los Angeles Chamber of Commerce Board of Directors encompasses Los

Angeles County and San Bernardino County, and Riverside County, and Orange County?

MR. LESAGE: Yes. It's the Greater Los Angeles Area -- Los Angeles Southern California.....

SENATOR DAVIS: It's the great basin.

MR. LESAGE: Yes. It's the Ventura, Santa Barbara, I think, Orange County. How far out -- I think it does go San Bernardino and Riverside as well. So, it's a big chunk of area. However, obviously.....

SENATOR DAVIS: Is part of it Los Angeles City and Los Angeles County?

MR. LESAGE: Yes. That's true.

CHAIRMAN: It follows the LA Metropolitan Water District.

MR. LESAGE: I think that's about right.

CHAIRMAN: Mr. LeSage, thank you very much for your testimony. Is there anyone else here today who would care to testify on this issue? If not, thank you all very much for attending. Oh, I have one announcement to make.

SENATOR DAVIS: I would like you and Mr. Thomson to consider the practicality of going to Portland and listening for one day and maybe going to New Orleans and listening for one day to the Louisiana system.....

CHAIRMAN: OK. You've hit the good idea and the better idea, but you haven't yet come to the best idea. And that was the one that you had at lunch -- that we study the non-unanimous jury in London.

SENATOR DAVIS: The 10-2 in all of Great Britain should be investigated also.

CHAIRMAN: Well, we'll certainly look into that. I just wanted to announce also that we did invite both proponents and opponents of this particular measure who were not able to attend, or for some reason did not attend. On the proponent side we did invite Evelle Younger, the former Attorney General; and Justice Robert Kane who are the cosponsors of the Criminal Courts Reform Initiative. We invited the California District Attorneys Association; and we did invite Chief Daryl Gates. On the opposition side we invited the Attorney General -- they were supposed to appear and did not. We invited the Friends Committee on Legislation -- they did not appear; and also the American Civil Liberties Union. We also invited the County Supervisors; the California Judges Association; the Judicial Council; and the State Bar of California, the last four having as yet taken no position on the Initiative -- on the Criminal Courts Reform Initiative. So, I just wanted you to know that we tried to get as many as we could.

We are very pleased to have had your attendance. Thank you very much, members and staff, and all parties concerned -- Sergeants, Special Services, Recorders.

A P P E N D I C E S

Senate Constitutional Amendment No. 10

Introduced by Senator Preseley

February 11, 1983

Senate Constitutional Amendment No. 10—A resolution to propose to the people of the State of California an amendment to the Constitution of the state, by amending Section 16 of Article I thereof, relating to juries.

LEGISLATIVE COUNSEL'S DIGEST

SCA 10, as introduced, Presley. Juries: criminal causes.

Existing provisions of the constitution permit a verdict to be rendered in a civil cause by three-fourths of the jury and permit a jury to consist of 12 or fewer persons in misdemeanor criminal actions.

This bill would provide that in a criminal action, other than for an offense punishable by death, five-sixths of the jury may render a verdict.

Vote: ⅔. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

Resolved by the Senate, the Assembly concurring, That the Legislature of the State of California at its 1983–84 Regular Session commencing on the sixth day of December, 1982, two-thirds of the members elected to each of the two houses of the Legislature voting therefor, hereby proposes to the people of the State of California that the Constitution of the state be amended by amending Section 16 of Article I thereof, as follows:

SEC. 16. Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the

parties expressed as prescribed by statute.

In civil causes the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. In civil causes in municipal or justice court the Legislature may provide that the jury shall consist of eight persons or a lesser number agreed on by the parties in open court.

In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. *In a criminal action, other than for an offense punishable by death, five-sixths of the jury may render a verdict.*

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California Legislature

SENATE COMMITTEE ON JUDICIARY

SENATOR BARRY KEENE
CHAIRMAN

ROOM 2187
STATE CAPITOL
SACRAMENTO, CA 95814
(916) 445-5957

November 17, 1983

M E M O R A N D U M

TO: Members, Senate Judiciary Committee

FROM: Gene W. Wong

RE: SCA 10 (Presley)--Non-unanimous criminal verdicts

Section 16 of Article 1 of the California Constitution has been consistently interpreted by the courts to require that jury verdicts in criminal cases be agreed upon unanimously. SCA 10 would instead permit a verdict in a non-capital criminal case to be agreed upon by only five-sixths of the jurors.

Since the California Constitution generally mandates a 12 person jury for criminal trials, SCA 10 would permit a conviction or acquittal of the charge by a 10-2 vote. For misdemeanor trials where the parties agree upon a lesser number of jurors, SCA 10 would permit a decision by five-sixths of the jurors. [However, the minimum constitutionally permissible jury size appears to be at least seven when the verdict may be decided upon non-unanimously. Although the parties could agree to a six member jury and SCA 10 would permit a verdict by five members of that jury, the United States Supreme Court has held unanimously that "conviction by a non-unanimous six member jury in a state criminal trial for a non-petty offense deprives an accused of his constitutional right to trial by jury." See Burch v. Louisiana (1979) 441 U.S. 130.]

Except for prohibiting a conviction by five-sixths of a six member jury, federal constitutional law does not bar a state from using non-unanimous jury verdicts in criminal cases. In 1972, the United States Supreme Court addressed the issue and narrowly upheld non-unanimous jury verdicts in state criminal trials against equal protection and due process challenges. In Johnson v. Louisiana (1972) 405 U.S. 356, the Court allowed 9-3 verdicts,

and in Apocada v. Oregon (1972) 406 U.S. 404, 10-2 verdicts. Both rulings were by five to four votes.

There are, however, competing policy arguments that must be weighed. Generally, those in favor of non-unanimous verdicts make four points.

1. Nonunanimity would reduce the time and expense of trials and retrials because there should be fewer hung juries.

2. It would resolve the problem of the obstinate juror.

3. It would reduce the problem of jury corruption since a single corrupt juror could no longer cast the deciding vote.

4. It would be more democratic since the requirement of unanimity enables one person to overcome the interest of others and thwart the majority will.

Those against non-unanimous verdicts have made several counter-arguments.

1. Change to a non-unanimous system would not result in great savings of time or expense. Only a small percentage of the hung cases are actually re-tried because many are dismissed by the district attorney or are pleaded to by the defendant. Further, hung juries would still occur under a non-unanimous system.

2. Unanimity is essential to the legitimacy of verdicts and to confidence in our legal system because it supports the fairness of verdicts.

3. The problem of jury tampering is not sufficient to warrant preventive measures as drastic as elimination of the unanimity principle. Less drastic alternatives are available, such as stricter enforcement of laws against jury tampering.

4. Unanimity is necessary to ensure responsible deliberation and careful weighing of the evidence in a dispute. Under a non-unanimous system, a jury may simply stop deliberating when it reaches the requisite majority.

5. The need for unanimity reinforces the requirement that juries be selected from a representative cross-section of the community because it gives each juror, even members of small minorities, a voice. Non-unanimous verdicts

might have the effect of disenfranchising minority groups from effective participation in the legal system.

6. Unanimity supports the social decision that it is far worse to convict an innocent person than to let a guilty person go free.

This memorandum presents only a brief overview of the issues raised by SCA 10. For a more complete discussion, please refer to the attached committee analysis of SCA 10.

GWW/sw

SENATE COMMITTEE ON JUDICIARY
Barry Keene, Chairman
1983-84 Regular Session

SCA 10 (Presley)
As introduced
Constitution Code
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NON-UNANIMOUS JURY VERDICTS
-CRIMINAL CASES-

HISTORY

Source: L.A. District Attorney

Prior Legislation: SCA 22 (1971) - held in this committee

Support: CDAA; State Chamber of Commerce; CPOA; State Sheriffs and Police Chiefs Ass'n; L.A. Chamber of Commerce; L.A. County Sheriff; numerous individuals

Opposition: Attorney General; State Public Defender; ACLU; CACJ; CTLA; California Public Defenders Ass'n; Los Angeles County Bar Ass'n

KEY ISSUE

INSTEAD OF UNANIMOUS VERDICTS, SHOULD ONLY 10 OUT OF 12 JURORS BE ABLE TO RENDER A VERDICT IN NON-CAPITAL CRIMINAL CASES?

PURPOSE

The California courts have consistently interpreted the California Constitution as requiring that a jury verdict in a criminal case be agreed to by all 12 jurors.

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This bill would permit a criminal verdict, other than for an offense punishable by death, to be agreed upon by only five-sixths of the jurors.

The purpose of the bill is to reduce the number of hung juries.

COMMENT

1. Highlights of analysis

During the interim, this committee held a full day hearing on this measure. The following summarizes some of the arguments made and conclusions drawn at that hearing.

-- The Constitution and, apparently, common law tradition would not impede the enactment of this measure (see Comments 2 and 4).

-- There is, however, little or no empirical evidence available to support a change to a non-unanimous verdict (see Comment 5).

-- Proponents asserted that the obstinate jury or jurors cause about one-half of the felony trials that are hung in Los Angeles County. They assert that SCA 10 would save the time and expense of a retrial (see Comment 6) and spare the victim from further pain as well. They also cited a poll conducted in Los Angeles County showing that 72% of those polled support the change.

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-- Opponents argued that SCA 10 would result in a deterioration of justice. It would short-circuit meaningful deliberation by juries (see Comment 8), threaten minority representation on juries (see Comment 10), undercut the DA's burden to prove his case beyond a reasonable doubt (see Comment 9), undermine public confidence in the system, could result in the freeing of guilty offenders, and would not save significant time or money (see Comment 11).

-- Several possible drafting defects were also noted (see Comment 13).

-- There are other approaches to the problem (see Comment 14).

2. Non-unanimous verdicts permitted by U.S. Supreme Court

(a) Johnson and Apodaca

The U.S. Supreme Court considered the question of whether criminal verdicts need be unanimous in the cases of Johnson v. Louisiana (1972) 406 U.S. 356 and Apodaca v. Oregon (1972) 406 U.S. 404, and divided 4 to 4 to 1. Justices White, Burger, Blackmun, and Rehnquist held that the Constitution did not require a unanimous verdict. Justices Stewart, Brennan, Marshall, and Douglas held that it did. The final justice, Powell, held that the 6th Amendment to the U.S. Constitution did require unanimous

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verdicts, but that that requirement was not imposed upon the states by the 14th Amendment.

The result of these cases was to require unanimous verdicts in federal criminal trials, but to permit state juries to render verdicts by votes of 10 to 2 or 9 to 3 - at least in non-capital cases.

(b) Subsequent cases

Since Johnson and Apodaca the court has refused to hear a case in which the sole ground of appeal was a non-unanimous verdict. The court did hear Burch v. Louisiana (1979) 441 U.S. 130 in which the justices unanimously held that a verdict by a six-member jury for a non-petty offense had to be unanimous.

3. No new states with non-unanimous verdicts

At the time of Johnson and Apodaca Louisiana and Oregon were the only states which permitted non-unanimous verdicts in felony and misdemeanor cases. Idaho, Montana, Oklahoma, and Texas permitted non-unanimous verdicts in misdemeanor cases, but required unanimity for felonies. (Montana has since amended its Constitution to require unanimous verdicts in all criminal trials.)

Since Johnson and Apodaca no state, according to the National Center for State Courts, has adopted the non-unanimous verdict. Arizona amended its Constitution in 1972 authorizing the Legislature to provide for a less than

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unanimous verdict in some felony cases, but the Legislature has thus far not done so.

4. History of unanimous verdicts - no impediment

Unanimity has been a part of the common law tradition for over 600 years. The first case in which it was recorded that the jury had to be unanimous was decided in 1367. In the latter half of the 14th century it became settled that a verdict had to be unanimous, and unanimity was an accepted feature of the common-law jury by the 18th century.

However, according to Professor Alan Scheflin of the University of Santa Clara Law School, historical arguments for the unanimity requirement for the most part are not conclusive. He stated that the history of the unanimity rule "is shrouded in mystery," and that "of the many different theories virtually none of them apply to the legal procedures that we have today." He concluded that historical tradition was not an impediment to the enactment of this measure.

5. Number of hung juries -- scant evidence on subject

Proponents offer SCA 10 as a way of reducing the "substantial number" of hung juries in criminal cases. Unfortunately, there exists very little empirical data on the number of hung juries in criminal trials. The following may, however, give some idea of the scope of the problem.

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(a) Los Angeles County

According to the Los Angeles District Attorney, 1,346 felony trial juries were sworn in 1981, of which 209 hung. In 1982 1,174 felony juries were sworn and 184 hung. Averaging the two years, 15.5% of the juries deadlocked.

There is, however, no empirical record of how many of the hung juries were divided by votes of 11 to 1 or 10 to 2. The Los Angeles District Attorney, based on an informal poll of his prosecutors, estimates that in approximately one-half of those cases the juries were hung 10 to 2 or 11 to 1 for conviction.

(b) Contra Costa County

According to the Contra Costa District Attorney, 271 felony trial juries were sworn during 1982, of which 29 or 11% hung.

Of the 29, seven deadlocked at a vote of 11 to 1 for conviction, nine at 10-2 for conviction, and only three had less than 6 for conviction. Thus, at least 16, or over half, would have been affected by this bill.

(c) Ventura County and CDAA study

Ventura County did an informal study of hung felony juries in Ventura and 20 other CDAA counties.

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The study showed that about 8% (136 of 1794) of the juries hung in the CDAA counties and 9% (30 of 317) in Ventura. Of those, 41% (56 of 136) were hung 11-1 or 10-2 for guilty in the 20 CDAA counties and 40% (12 of 30) were hung 11-1 or 10-2 for guilty in Ventura County. Within that group, about 60% to 67% were hung 11-1 for conviction.

(d) OCJP study

A 1975 study ("Empirical Study of Frequency of Occurrence, Causes, Effects and Amount of Time Consumed by Hung Juries" for O.C.J.P. by Planning and Management Consulting Corp.) shows a three year aggregate statewide total for hung juries at 977 of 8,011 jury verdicts for the period 1970 to 1972, or a rate of 12.1%. Of these cases, 41% were subsequently dismissed, 33% plea-bargained, and 26% re-tried at an estimated cost (in 1975) of $8.7 million.

The study also found that 29.3% of these cases hung at 11-1 or 10-2 for guilty and 9.6% of them hung at 11-1 of 10-2 for not guilty.

6. Substantial cost savings asserted

In Los Angeles one day of a felony jury trial costs $4,285. The Los Angeles District Attorney estimates that the average felony jury trial lasts 4 days, and then multiplies that by $4,285 and by the 393 hung juries in 1981 and 1982, for a total of $6.7 million.

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That figure is not, however, an indication of the cost savings in this bill, since those trials and the resulting expenditure would have taken place whether or not the jury was hung. A better indication of savings may be the following: in 1981 there were 209 hung juries and an additional number of cases which ended in a mistrial, but in 1982 only 36 cases were re-tried. The effect of this bill would be to eliminate some of those retrials.

Further, the cost savings might be illusory because there may well be a tendency to re-try cases that are now plea bargained or dismissed (because of the presumed inability to get a unanimous verdict) since the prosecutor would need only 10 votes for a conviction. (See also the next Comment).

WOULD THIS BILL RESULT IN SIGNIFICANT COST SAVINGS?

7. Easing prosecutor's burden

A second effect of SCA 10 would be to shrink the burden of the prosecutor and expand that of the defense attorney. Under present law the prosecutor must convince all 12 jurors beyond a reasonable doubt, while the defense attorney must raise a reasonable doubt in only one. Under SCA 10 the prosecutor's task would be reduced from 12 to 10 and the defendant's expanded from one to three.

The reduced burden could induce prosecutors to bring to trial cases they would not bring under present law. As these would be their weakest cases, some would end in hung juries.

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This could result in a reduction of the cost savings from SCA 10.

8. Effect on jury behavior

Justice Powell and the proponents of this bill argue that the removal of the unanimity requirement would minimize the chance that a jury would be hung by one irrational juror. District attorneys claim that the irrational juror is an all too common phenomenon.

A number of former jurors, however, support the unanimity requirement because of its effect on the deliberations. The need to convince every juror results in a more thorough consideration of the evidence by all jurors. In contrast the deliberations in the Apodaca case, in which the defendant was convicted of assault with a deadly weapon, burglary in a dwelling, and grand larceny, lasted only 41 minutes.

A survey of all felony jury verdicts in Multnomah County (Portland) Oregon which uses a 10 - 2 system, for a three year period ending in 1983 indicates that abolishment of the unanimity requirement affects jury deliberations and removes motivation for the jurors to continue deliberating after they have reached the 10 or 11 votes necessary for a verdict. That survey shows that only 44% of the convictions were arrived at unanimously while 56% were arrived at by either an 11 - 1 or 10 - 2 vote.

WOULD THE DELIBERATIVE PROCESS SUFFER IF VERDICTS MAY BE REACHED NON-UNANIMOUSLY?

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9. Effect on reasonable-doubt standard

Defendants in Johnson and Apodaca appealed on the ground that the unanimity requirement is necessary to give substance to the reasonable-doubt standard. They argued that a single juror voting to acquit was proof that the prosecution had failed to carry its burden of proving guilt beyond a reasonable doubt.

A majority of the court (White, Burger, Blackmun, Rehnquist, and Powell) held that it did not.

> In our view disagreement of three jurors does not alone establish reasonable doubt, particularly when such a heavy majority of the jury, after having considered the dissenters' views, remains convinced of guilt. That rational men disagree is not in of itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard. (Johnson v. Louisiana.)

10. Effect on minority group representation on juries

The dissenting justices and the opponents of this bill argue that the Court has repeatedly required jury panels to reflect a cross section of the community, but that these decisions would be undercut by non-unanimous verdicts in that the 10 jurors could simply ignore the views of their fellow

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panel members of a different race, class, sex or status.

This argument was rejected by the majority for two reasons. They first said that while the Constitution requires the participation of all groups in the overall jury process, it does not require the representation of any particular group on any particular jury, and thus clearly does not require that a member of a particular group vote for conviction in order for that conviction to be valid. In addition the majority refused to assume that a majority of jurors would "deprive a man of his liberty on the basis of prejudice when a minority is presenting a reasonable argument in favor of acquittal." (Apodaca v. Oregon.)

Justice Powell added briskly that there is a risk under any system that a jury will fail to meet its responsibilities, and that he found nothing in Oregon's experience to indicate that non-unanimous juries were more irresponsible than others.

11. Opposition arguments

(a) Attorney General

In opposing this bill the Attorney General stated:

> Eliminating the traditional protection of the unanimous jury verdict is a major and symbolic departure from one of the most fundamental principles of our judicial system. Absent clear

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> evidence documenting the need for such a radical change, we do not believe the benefits to be gained to justify such an amendment to California's Constitution.
>
> As prosecutors, the prospect of reducing hung juries is certainly attractive. In the final analysis, however, we believe the minimum savings do not justify reducing what is perhaps the most basic and widely accepted aspect of our criminal justice system.

(b) Sir William Blackstone

In 1769 Sir William Blackstone wrote:

> But the founders of the English laws have with excellent forecast contrived . . . that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion. So that the liberties of England cannot but subsist, so long as this palladium remains sacred and inviolate . . . from all attacks . . . . [Emphasis added.]

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> And however convenient these [attacks] may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

(c) Defense bar

In addition to the arguments already discussed, the defense groups also raised the following arguments at the interim hearing.

(1) Change to a non-unanimous system would not result in great savings of time or expense. Only a very small percentage of jury trials hang (about 12% to 15%) and less than a majority of those hung cases were deadlocked 10 - 2 or 11 - 1. Further, only

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a small percentage (26%) of the hung cases are actually re-tried because many are dismissed by the district attorney or are pleaded to by the defendant. In addition, hung juries would still occur under a non-unanimous system.

(2) Unanimous verdicts give the public greater assurance that justice was done.

(3) Non-unanimity is a two-edged sword. It would require that a defendant be discharged when 1 or 2 of the jurors voted for conviction and the others voted for acquittal.

(4) Unanimity supports the social decision that it is far worse to convict an innocent person than to let a guilty person go free.

(6) SCA 10 would result in greater numbers of factually innocent people being convicted.

(5) The vast majority of the 50 states and the federal

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system still adhere to the requirement of unanimity.

(7) Abolition of the unanimity requirement would create a precedent for further dilution of the right to jury trial.

12. Effect on smaller jury

Under existing law, the Constitution permits parties to a misdemeanor trial to agree to a jury less than 12. On May 17, this Committee approved SCA 32 (Boatwright) which would permit the Legislature to set the number of jurors in misdemeanor cases at 6 or more.

This bill provides that a verdict could be rendered by five-sixths of the jury.

However, the minimum constitutionally permissible jury size appears to be at least seven when the verdict may be decided upon non-unanimously. Although the parties could agree to a six member jury (or the Legislature could provide for a 6 person jury if SCA 32 passes) and SCA 10 would appear to permit a verdict by five members of that jury the United States Supreme Court has held unanimously that "conviction by a non-unanimous six member jury in a state criminal trial for a non-petty offense deprives an accused of his constitutional right to trial by jury." See Burch v. Louisiana (1979) 441 U.S. 130.

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Thus, while SCA 10 might permit a verdict by five persons of a six-person jury in a minor offense not yet reduced to the status of infractions, the bill would be a nullity with respect to six-person juries in cases involving most misdemeanors.

13. Possible constitutional and procedural problems.

(a) Possible equal protection question

This measure would allow a defendant in a non-capital case to obtain his acquittal when five-sixths of the jury voted for acquittal. A defendant in a capital case, however, would be required to obtain a unanimous verdict for his freedom.

On the one hand, requiring a capital case defendant to bear a heavier burden to obtain an acquittal than a non-capital case defendant could be argued as a violation of the equal protection clause. On the other hand, it could be argued that the state has a greater interest in ensuring the guilt or innocence of an alleged first degree murderer.

Assuming that an equal protection problem exists, a solution could be to require a unanimous verdict only for a conviction of first degree murder.

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(b) Unanimous verdicts required for lesser included offenses

Under existing law, a jury in a first degree murder case may find the defendant guilty of a lesser included offense (second degree murder or manslaughter) when they are not convinced on the capital charge.

That practice would continue under this bill, but the jury would be required to be in unanimous agreement on the lesser included offense. A 10 - 2 or 11 - 1 vote would not be sufficient to return a verdict of manslaughter in a capital case since the language of the measure would require unanimous verdicts in any criminal action for a capitol offense.

The problem could be resolved by requiring a unanimous verdict only for a conviction of first degree murder.

14. Alternative approaches

(a) Component in Criminal Court Reform Initiative

A provision in the Criminal Court Reform Initiative, which is in the process of being qualified for the ballot and which is backed by the source of SCA 10, would also allow non-unanimous verdicts in non-capital cases. However, the language of the initiative differs from SCA 10. It

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provides that "in a criminal action the agreement of 10 jurors shall be sufficient to render a verdict, except that the verdict shall be unanimous when the defendant is charged with a crime for which the penalty of death is sought."

The chief difference between the two proposals is that the initiative would require, in effect, that criminal juries always consist of at least 10 jurors while SCA 10 would apply to juries of as few as seven.

(b) English system

After 600 years of adhering to the unanimity requirement, England amended its laws in 1967 to give the trial judge the option to accept a 10-2 verdict after the jury has deliberated for at least two hours. The judge may require the jurors to deliberate for a longer period before exercising this option or he may simply not exercise the option.

SHOULD JURIES BE REQUIRED TO DELIBERATE FOR SOME SPECIFIED TIME PERIOD BEFORE RETURNING A NON-UNANIMOUS VERDICT?

(c) 11-1 vote

The principal argument of the proponents of SCA 10 is that it would resolve the problem of the obstinate juror. If so, it seems that a change

to an 11-1 system would meet the proponents primary concern since the chance of two obstinate jurors being selected for the same jury seems remote.

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